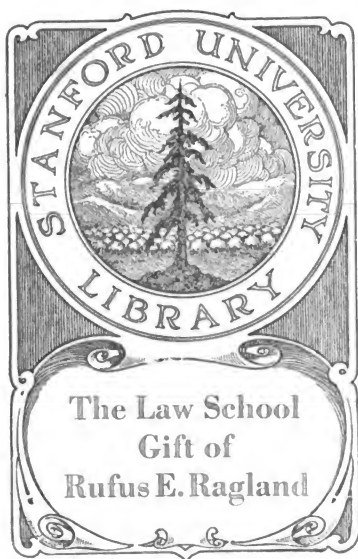


James P. Treadwell



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SIMONS' REPORTS.

REPORTS
OF
CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,
BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

WITH NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN
DECISIONS.

BY JOHN A. DUNLAP,
COUNSELLOR AT LAW.

VOL. IX.
CONTAINING SIMONS' CHANCERY REPORTS, VOLS. 5 & 6.
1831, 1832, 1833, & 1834.

NEW-YORK:
BANKS, GOULD & CO., LAW BOOKSELLERS.
ALBANY:
GOULD, BANKS AND GOULD, 475 BROADWAY.
1851.

Entered, according to the Act of Congress, in the Year Eighteen Hundred and Fifty-One,
By BANKS, GOULD & CO.,
In the Clerk's Office of the District Court of the Southern District of New York.

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BY NICHOLAS SIMONS,
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

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WITH A FEW OF LATER DATE.

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LORD BROUGHAM AND VAUX	-	Lord Chancellors.
SIR J. LEACH,	Master of the Rolls.
SIR L. SHADWELL,	-	Vice-Chancellor.
SIR T. DENMAN,	}	Attorneys-General.
SIR W. HORNE,		
SIR W. HORNE,	}	Solicitors-General.
SIR J. CAMPBELL,		

A

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CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

SIMPSON v. WALKER.

1831: 16th & 22d November.—*Will.—Revocation.—Fraudulent Deed.*

▲ Deed executed under circumstances which render it void in Equity, and not at Law is a revocation of a prior Will. [1]

In 1792 the Plaintiff and *Lot Simpson* his Brother became, under their late Father's Will, seised in fee, as Tenants in Common, in equal Moieties, of a Messuage, and about 23 Acres of Land in the Parish of *Crick* in the County of *Derby*, in remainder expectant upon the decease of *Rumey Simpson* their Mother. In 1811, *Lot Simpson* went to *Buenos Ayres*, and obtained a subsistence there by Manual Labour. In October 1817 *Rumey Simpson* died; and, upon her death, *Lot Simpson* returned to *England*. In 1818 he entered into a Treaty with the Plaintiff, for the purchase of the Plaintiff's Moiety of the Estate; but they were not able to agree as to the price, and, accordingly, they referred it to the Defendant (who was the Son of their late Father's Executor, and resided near the Estate) to fix the price. The price was accordingly fixed by the Defendant, and paid, by *Lot Simpson*, to the Plaintiff; and he, thereupon, conveyed his Moiety of the Estate, to *Lot Simpson* in fee. In November 1818 *Lot Simpson* returned to *Buenos Ayres*, hav- [*2] ing previously appointed the Defendant to manage and receive the Rents of the Estate, in his absence. In August 1825, *Lot Simpson* again returned to *England*, but he never resided upon, or in the neighbourhood of his Estate; and the Defendant continued to manage and receive the Rents of it. In June 1830 *Lot Simpson* died, leaving the Plaintiff his Heir-at-law, who was then resident in *North America*. The Plaintiff, on his return to *England*, in January 1831, required the Defendant to deliver

[1] 2 M. & Cr. 441. n. 2. 2 *Ibid.* 611. note 2.

 1831.—*Simpson v. Walker.*

up to him the possession of the Estate, and to account to him for the Rents received since *Lot Simpson's* death; which the Defendant refused to do, alleging that he had purchased the Estate of *Lot Simpson*, and that it had been conveyed to him by certain Deeds and Assurances dated in May 1830, in consideration of an Annuity of 50*l.* to be paid, by the Defendant, to *Lot Simpson* during his life.

The Bill, after stating as above, charged that the Plaintiff had discovered, and that the fact was that *Lot Simpson* did execute such deeds and Assurances; but that the Defendant prevailed upon him to execute them, by misrepresentation and undue influence, as after mentioned, and that such Deeds and Assurances were, therefore, void in Equity: that *Lot Simpson* was an ignorant and unlettered Person, and had been, all his life, except for a few months before his death (when he became too ill to work), a common Labourer, and had never been instructed in or practised any Trade or Business: that, in early life, he had become addicted to excessive drinking, and was, up to the time of his death, an habitual Drunkard: that he was a Person of very weak intellect, and easily led and practised [*3] ed upon by any Person with whom he happened to be associated: that the Defendant, though he was by trade a Cordwainer, had been, for many years, much accustomed to business of a general nature; and had been, on many occasions, employed, by his Neighbours and Friends, to make their Wills, and other Instruments of a Legal nature: that the Defendant, before and at the time of the execution of the Deeds of May 1830, had acquired great influence over *Lot Simpson*, who was accustomed to consult him about his Affairs, and to be guided by his advice: that, at the time of the execution of the Deeds, the Estate was free from Incumbrances, and the clear Rental thereof was 47*l.* 10*s.* per annum, and *Lot Simpson* was not at all indebted to the Defendant; and that he had no knowledge of the Rental of the Estate, or of the value thereof, except as he was informed thereof, by the Defendant; and that, before and when he executed the Deeds, he was informed, by the Defendant, and believed that the yearly value of the Estate was much less than 47*l.* 10*s.*, and that it was subject to many outgoings and deductions, and that the Annuity of 50*l.* for his life, was a full and adequate consideration for the same: that no valuation of the Estate was made for *Lot Simpson*, by any Person, nor was any Person employed, on his behalf, in relation to the Sale; and that, at the execution of the Deeds, he was not in a fit state of mind to do any deliberate act of Business. The Bill prayed that the Deeds and Assurances of May 1830, might be declared to be invalid in Equity, and be delivered up to be cancelled: that the Defendant might execute a conveyance of the Estate to the Plaintiff, and account with him for the Rents received since *Lot Simpson's* death; and that a Receiver might be appointed.

1831.—Simpson v. Walker.

"The Defendant pleaded that *Lot Simpson*, by his Will, dated [*4] the 20th April 1829, and duly executed and attested for devising Freehold Estates of Inheritance, devised the Estate in question, and all other his Real Estate to the Defendant, for his life, and after his decease, to *Samuel Walker* and *Hannah Walker*, the Defendant's Son and Daughter, equally, as Tenants in Common, and to their Heirs and Assigns: Provided that, if either of them should die under 21 and without Issue, then the Testator devised, the said Estate, to the survivor of them, his or her Heirs and Assigns; and, if both of them should die under 21 and without Issue, then to the Defendant's right Heirs: that the Testator died in June 1830, without having altered or revoked his Will, except so far as the same might be deemed to have been altered or revoked by the Deeds in the Bill mentioned to have been executed in May 1830, and leaving the Defendant and his two Children him surviving.

Mr. *Knight* and Mr. *Rolfe* in support of the Plea:

The Plaintiff's position is that the Deeds of May 1830, are not only void, but operate as a revocation of the Will. In *Hawes v. Wyatt* (a), Lord *Alvanley* decided that a Deed which was void on equitable Grounds only, was a revocation of a Will: but Lord *Thurlow* reversed that Decree (b): and, consequently, this Plea cannot be disallowed without overruling Lord *Thurlow's* decision. Supposing the Deeds to be invalid in Equity, then according to the doctrine laid down, by Lord *Thurlow*, in *Hawes v.*

Wyatt, the transaction is to be "treated as a Mortgage merely; [*5] and, in this Court, a Mortgage, being only a Security for Money, is not a revocation of a prior Will. Upon what principle is it that a Deed, which is inoperative in Equity, is held to carry with it an intention to revoke a Will? The ground on which the Court interferes when it sets aside a Deed for Fraud, is that there was no intention at all to execute the Deed. If a Party makes his Will, and, afterwards, does an act varying the disposition of his Property, if that Act cannot take effect, why should it be inferred that he had an intention to alter the disposition of his Property which he had made by his Will. Lord *Alvanley's* decision in *Hawes v. Wyatt*, benefited a third Party, and not the Plaintiff. Here the Testator made his Will for the benefit of the Defendant, and then conveyed the Estate to him; why is he to be placed in a worse situation, than he would have been in, if no such Conveyance had been executed. *Parker v. Ramsbottom* (c) is very analogous to the present Case.

Secondly: the Bill states a Case, not merely of Equitable, but also of Legal individuality; for it alleges that *Lot Simpson*, when he executed the

(a) 2 Cox, 263.

(b) 3 Bro. C. C. 156.

(c) 3 Barn. & Cress. 257.

1831.—Simpson v. Walker.

Deeds, was not in a fit state of mind to do any deliberate act of Business. Now a Deed which is void at Law, is not a revocation of a prior Will, but is a mere nullity.

Mr. *Wigram*, in support of the Bill:

Lord *Alvanley* held in three different Cases (*d*), that a Deed [*6] which was void in Equity, was a revocation of a *prior Will: and Lord *Hardwicke* was of the same opinion. *Hick v. More* (*e*). That Case was not cited on the Appeal, to Lord *Thurlow*, from Lord *Alvanley's* Decision, in *Hawes v. Wyatt*. In *The Attorney-General v. Vigor* (*f*), Lord *Eldon* expressed considerable doubt as to the soundness of the principle of Lord *Thurlow's* Decision. The ground upon which a Court of Equity rescinds a Conveyance which at Law is valid, is not that the Grantor did not intend to convey, but that the Party to whom the Conveyance is made is not entitled in Equity to the benefit of that intention. The legal Estate has passed, in fact, and alone is decisive.

The objection that the Bill states a Case of Legal invalidity, if it appears on the face of the Bill, ought to have been taken advantage of by Demurrer, and not by Plea: and the fact that the Plaintiff is obliged to call for a Reconveyance, disposes of all the Arguments in support of the Plea.

The *Vice-Chancellor* took time to consider the Case; and, on this day delivered Judgment to the following effect.

In this Case, the Plaintiff, who is the Heir of *Lot Simpson*, has filed a Bill, insisting that certain Deeds, dated in May 1830, were executed under circumstances of Fraud, which make them void in Equity. The Fraud is represented to consist in the Defendant having induced *Lot Simpson*, a weak man, to execute the Deeds for a very inadequate consideration, under a belief that the consideration was adequate; and the Bill charges [*7] that *the intention of *Lot Simpson* was to sell for full consideration, and not to make a Gift; and the Bill prays that the Deeds may be delivered up to be cancelled, and the Estate conveyed, by the Defendant, to the Plaintiff. The Defendant has pleaded that, prior to the date of the Deeds, *Lot Simpson* duly made his Will, and devised the Estate to the Defendant, and that the Will was not revoked otherwise than by the Deeds mentioned in the Bill.

In *Hawes v. Wyatt*, Lord *Alvanley* held that, in such a Case, the Will was wholly revoked. Lord *Thurlow* reversed Lord *Alvanley's* Decree. But, in Lord *Ilchester's* Case, Lord *Alvanley* expresses an adherence to his own opinion; and Lord *Eldon*, in *The Attorney-general v. Vigor*, disapproves,

(*d*) *Hawes v. Wyatt*, *ubi supra*. *Harwood v. Oglander*, 6 Ves. 215. *Ex parte the Earl of Ilchester*, 7 Ves. 373.

(*e*) *Amb. 215*.

(*f*) 8 Ves. 253.

 1831.—*Sayle v. Graham.*

or, at least doubts of the propriety of Lord *Thurlow's* decision. When the Case of *Hawes v. Wyatt* was before the Court, no notice seems to have been taken of *Hick v. Mors*, in which Lord *Hardwicke* decided in the contrary way from Lord *Thurlow*.

The balance of opinion seems to be in favour of the position that the Will was revoked. But in the absence of authority, my opinion, upon principle, is against the Plea.

If a Feoffment be made, without livery of Seisin, it revokes a prior Will. So a Bargain and Sale not inrolled, is a revocation. Now, in the present Case, the Legal Estate is admitted to have passed by the Deeds; and it seems clear that if, after the Deeds had been executed, a full consideration had been paid to *Lot Simpson*, he could never have impeached them: for he did intend to convey to the Defendant. The Deeds, there- [*8] fore, though imperfect in Equity immediately upon their execution, might, afterwards, have been made complete; and they were perfect at Law. They, consequently, operated as a total revocation of the Will; and the Plea must be overruled; but, on account of the conflict of authorities, without Costs.

SAYLE v. GRAHAM.

1831: 14th November.—*Practice.*—*Answer.*

Plaintiff amended his Bill; before the Amendments were answered, the Suit abated. Plaintiff then filed a Bill of Revivor and Supplement, praying that the Defendants might answer that Bill, together with the Amendments. The Defendants put in an Answer to the Bill of Revivor and Supplement only. Motion to take the Answer off the file, for irregularity, refused.

THE Plaintiffs had amended their Bill; and before the Defendants had answered the Amendments, the Suit became abated by the marriages of two of the Female Plaintiffs; upon which the Plaintiffs filed a Bill of Revivor and Supplement, praying that the Defendants might answer that Bill, together with the amended Bill; and an Order to Revive was afterwards obtained. The Defendants, before they had answered the Amendments, put in an Answer to the Bill of Revivor and Supplement only.

Mr. *Knight* for the Plaintiffs, now moved that that Answer might be taken off the file, for irregularity. He said that it was contrary to the Practice of the Court for the Defendants to answer the Bill of Revivor and Supplement, and leave the amended Bill unanswered.

Mr. *Jacob* for the Defendants.

1831.—Davis v. Hammond.

The VICE-CHANCELLOR :

The usual course, certainly, is, in Cases like the present, to put [*9] in one Answer to the Bill of Revivor and *Supplement and the Amendments ; but there is no settled Rule making it necessary so to do. Where a Plaintiff has taken Exceptions to an Answer, and intends to amend his Bill, he obtains an Order for leave to Amend, and that the Defendant shall answer the Amendments and Exceptions at the same time. That seems to imply that an Order is necessary to make the Defendant answer the Amendments, together with the Exceptions. I cannot say that it is clear that, in this Case, the Amendments ought to have been answered ; and therefore I cannot grant the application (a). [1]

DAVIS v. HAMMOND.

1831 : 17th November.—*Practice*.—*Contempt*.

An Affidavit in support of a Motion for a Serjeant at Arms, under 11 Geo. 4, and 1 Will. 4, c. 36, Rule 1, which relates to the Defendant's Residence, and not to the place where he was at the issuing of the Attachment, is insufficient.

MR. CHANDLESS moved for a Serjeant at Arms, under 11 Geo. 4, and 1 Will. 4, c. 36, s. 15, Rule 1, on the Sheriff's return of *non est inventus*.

The Affidavit in support of the Motion, went to show that due diligence had been used to discover the Defendant's Residence, and not the place where he was, at the time of issuing the Attachment.

The *Vice-Chancellor* said that he would not grant the Order, upon that Affidavit, as it related to the residence only of the Defendant, that it ought to have pursued, precisely, the words of the Act: and that he had so decided in a Case of *Mellor v. Mellish*, which had been affirmed by the *Lord Chancellor*.

(a) See *De Tastet v. Lopez*, ante, vol. i. p. 11.

[1] When a bill of revivor and supplement is filed against a person who represents a defendant to the original bill, and that defendant has appeared to but not answered the original bill, and the bill of revivor and supplement prays that the representatives of the deceased defendant, may answer both bills, he is bound so to do, although the subpoena taken out, requires him to answer the bill of revivor and supplement only ; and the answer, in the case put, is headed as the answer of that defendant to the bill of revivor and supplement and also to the original Bill. If in the case put, a mere bill of revivor is filed, an attachment will issue against the defendant, if he do not answer the original bill *Woodruff v. Daniel*, 9 Sim. 419.

Where a plaintiff had died before the defendant had answered, his representatives had filed a bill of revivor and supplement, and praying that the defendant might answer it and also the original bill. The defendant put in an answer which was entitled as his answer to the original bill of the plaintiff "since deceased" the answer was taken off the file—*Upton v. Sowton*, 12 Sim. 45.

1831.—Collard v. Hare.

*COLLARD v. HARE.

[*10]

1831: 21st & 22d November—*Sheriff—Costs—Practice.*

The Bill had been dismissed at the Hearing, with Costs, which the Plaintiff refusing to pay, he was taken under an Attachment. Afterwards, but before the Costs were paid, the Sheriff let the Plaintiff out of Custody, upon Bail, but retook him before the Writ was returnable. The Court refused to order the Sheriff to pay the Costs.

At the Hearing of this Cause, the Bill had been dismissed, with Costs. The Costs were, afterwards, taxed; and the Plaintiff was personally served with a Subpœna for payment of them; and the Amount was, at the same time, demanded of him; which he having refused to pay, the Plaintiff caused an Attachment to be issued against him, and he was taken into custody under it. Afterwards the Sheriff's Officer who had the Plaintiff in custody, suffered him to go at large on Bail, without the consent of the Defendant, and without his having paid the Costs. The Sheriff, however, before the Attachment was returnable, retook the Plaintiff, and he had ever since remained in custody.

A Motion, of which notice had been given before the return of the Attachment, was now made on behalf of the Defendant, that the Sheriff might be ordered to answer his Contempt in having suffered the Plaintiff to go out of his custody upon Bail, after having taken him under the Attachment; and that the Sheriff might be ordered to pay the amount of the Costs, to the Defendant, within a week after service of the Order to be made on the Motion, and also the Costs of and incidental to the Writ of Attachment, and of the Application.

Mr. *Knight*, in support of the Motion:

The Attachment, in this Case, issued for non-payment of Costs, which the Plaintiff was directed to pay by the Decree made at the Hearing, when his Bill was dismissed. The Decree being the final conclusion of the *Suit, the Attachment was equivalent to a *capias ad satisfaciendum* [*11] on final Judgment at Law; and, as it is a process of Execution, no Bail can be legally taken upon it. A moment's Escape is sufficient to fix the Sheriff; and he is not discharged from his Liability, by retaking the Plaintiff, and having him in custody at the return of the Writ. *Levett v. Letteny (a)*. *Anon (b)*.

Mr. *Cooke*, for the Sheriff:

It does not appear in either of the Cases which have been cited, that the Application was made, as in the present Case, before the return of the At-

(a) Reg. Lib 1784 fo. 10.

(b) 11 Ves. 170. See Beames on Costs, 138, 139, and Appendix, 352, 353.

1831—Collard v. Hare.

tachment, or that the Sheriff had the Party, against whom the Writ had issued, in custody at the return of the Writ; and, in the latter of those Cases, the Sheriff did not appear, and *Lord Eldon*, when he made the Order, observed that it was a strong measure.

Here the Attachment did not issue in execution of a Decree, but to enforce payment of Costs: it was not in the nature of Execution, but of Mesne Process. *Anon. (c)*. *Danby v. Lawson (d)*. *Anon. (e)*. It appears by those Cases, (neither of which was cited in the Case before *Lord Eldon*), that the Attachment is not a final Process. *Morris v. Hayward (f)* shows that the Sheriff is at liberty to take Bail upon an Attachment out of Chancery. In *Lewis v. Morland (g)*, it was decided that an Attachment for non-payment of Money, is in the nature of Mesne Process, and that, where the Sheriff has the Defendant in Custody at the return of the Writ, an Action for an Escape cannot be maintained against him. The Notice of Motion in this Case was served before the return of the Writ. No proceeding of a summary nature, can be taken, at Law, against the Sheriff, until the Writ has been returned.

Mr. Knight, in reply:

The Case in *Eq. Ab.* is unintelligible; and in the Case cited from *Prec. Cha.* the Liability of the Sheriff was not at all discussed: it only shows that a Messenger may go for the Party. In *Lewis v. Morland* the ground of the Judgment was that an Attachment, at Law, for non-payment of Money, was not final Process. *Bayley J.* says: "The object, therefore, of this Writ being to bring the Party into Court to answer, it is in the nature of Mesne Process. The nature of final Process, or Execution, on the other hand, is to satisfy the Plaintiff. The Attachment issues upon the *ex parte* Affidavit of the Person who demands the Money awarded to be due by the *Master's* allocatur, stating that the same has not been paid. If that were final Process, there would be nothing further to be done, by the Court, but to commit: but that is not the Practice; for Interrogatories are filed to be answered, and the Court ultimately pronounce, upon those Answers, whether the Party is to be committed for Contempt or not; for then only, and not before, does Commitment take place (*h*)."
In this Court, it is not the Practice to examine the Party on Interrogatories, and then to commit
[*13] him; there is no proceeding between the Caption and the Commitment: and consequently the grounds on which the Judgment in *Lewis v. Morland* was founded, do not exist in the present Case.

(c) *Prec. Cha.* 331.(d) 1 *Eq. Ab.* 351. pl. 3, 4.(e) 2 *Atk.* 507.(f) 2 *Marsh.* 280, S. C. 6 *Taunt.* 569.(g) 2 *Barn. & Ald.* 56. See 2 *Com. Dig.* Bail, F. 8.(h) 2 *Barn. & Ald.* 62.

1831.—*Robinson v. Field.*

The VICE-CHANCELLOR :

I have referred to all the Cases that were cited in the course of the Argument, but I have not found any conclusive authority upon the subject of the Motion. From what is stated in the Report of the Anonymous Case before Lord *Eldon*, it appears that his Lordship expressed it to be his opinion that it was a strong measure to order the Sheriff to pay the Costs, and that he made the Order, ultimately, on the ground that the Parties had been served with Notice, but did not appear. Besides, in that Case, and in *Levett v. Letteney*, the Application was made after the return of the Attachment and the Party seems to have wholly escaped from the Sheriff's custody. But here the Application is made before the return of the Writ; and the Sheriff has retaken the Party. So that there is a material distinction between those Cases and the present Case.

Having regard, therefore, to the want of authority binding me to make the Order applied for, (though I admit that there is authority that leads to it,) I am of opinion that the proceeding is of so severe and harsh a nature, that I ought not to make any Order on this Motion.

*ROBINSON v. FIELD.

[*14]

1831 : 24th November & 7th Dec.—*Plea.—Partnership.—Statute of Limitations.—Account.*

In 1800 *A, B, & C.* entered into Partnership as Attornies, upon certain Terms expressed in a Memorandum. In 1808, *A.* died, leaving *B.* his Executor and Residuary Legatee, and then *B. & C.* formed a Partnership, and agreed to share the Profits equally. In December 1825 their Partnership was dissolved by consent. During the former Partnership *A. & B.* had made Advances, both jointly and severally for *C.*'s private use: and during the latter Partnership *B.* made similar advances. In 1827 *B.* became Bankrupt. No settlement of Accounts having taken place between any of the Parties, in July 1831, *B.*'s Assignees filed a Bill, against *B. & C.* for an Account of the Dealings of both Partnerships, and of all the Advances made by *A. & B.* *C.* pleaded the Statutes of Limitations (21 Jas. 1, & 9 Geo. 4,) to so much of the Bill as related to such Advances. Held that, as the Plea extended to the joint Advances of *A. & B.* during the first Partnership, it covered too much, and was therefore, bad.

THE Plaintiffs were the Assignees of *Samuel Churchill*, the younger, a Bankrupt, and the Defendants were the Bankrupt and *S. C. Field* his late Partner. The Bill, which was filed on the 1st of July 1831, stated (amongst other things) that in Oct. 1800, *S. Churchill*, the elder, *S. Churchill*, the younger, and *Field*, entered into Partnership together, as Solicitors and Attornies, for seven years, upon the terms expressed in a Memorandum prepared by *S. Churchill*, the elder, by which it was stipulated (amongst other things) that *S. Churchill*, the elder,

1831.—Robinson v. Field.

should receive 100*l.* per Annum, out of the Profits of the Business, and that the remainder should be divided between *S. Churchill* the younger, and *Field*: that the Partnership continued until April 1808, when it was determined by the death of *Churchill* the elder, who, by his Will, appointed *Churchill* the younger his Executor and Residuary Legatee: that, after the death of *Churchill* the elder, *Churchill* the younger and *Field* agreed to carry on the Business, in Partnership, upon the terms expressed in the Memorandum, so far as the same were applicable to the altered

[*15] "state of circumstances, and that, accordingly, it was agreed between them that, from the death of *Samuel Churchill*, the elder, they should be interested, in the Profits of the Business, in equal Moieties; that the business was carried on by them accordingly until the 31st of December 1825, when the Co-partnership between them was dissolved by mutual consent: "That *Churchill* the elder, during his life, and *Churchill* the younger, both in the lifetime of *Churchill* the elder, and afterwards, lent and advanced to *Field*, and paid for his use, sundry large Sums of Money, at Interest, at Five per Cent.:" That, on the 26th of March 1827, a Commission of Bankruptcy was issued against *Churchill* the younger, under which he was found a Bankrupt, and the Plaintiffs were chosen his Assignees: that no settlement of the Accounts of the Co-partnerships, had ever been made, either during the life of *Churchill*, the elder, or since his decease, "and that no settlement of Accounts had ever taken place between *Churchill* the elder, during his life, and *Churchill* the younger, or either of them, and *Field*, in respect of the sums advanced and applied, by *Churchill* the elder and *Churchill* the younger, to or for the use of *Field*, and that a considerable Balance was due, to the Plaintiffs, as such Assignees as aforesaid, in respect thereof," and that, upon a fair settlement of the Accounts of the Partnership, *Field* would be found to be greatly indebted to the Plaintiffs, as such Assignees as aforesaid: "that on the 5th of April 1805 *Churchill*, the elder, advanced 800*l.* to *Field*, to enable him to purchase a Dwelling-house, and that, between the 4th of February 1808 and the 31st of December 1809, *Churchill*, the elder, and *Churchill*, the younger advanced the Sum of 5,483*l.* to *Field*, to enable him to complete the purchase of an Estate, and also various other Sums of Money at Interest at the rate aforesaid; and that, although *Field* had made some Payments in respect of Interest on those Sums, he had never repaid any part of the Principal, either to *Churchill*, the elder, or to *Churchill*, the younger, or to the Plaintiffs."

The Bill prayed for an Account of the Dealings and Transactions of the Co-partnerships, from October 1800 until the 31st of December 1825, and that such Account might be taken upon the footing of the Memorandum pre-

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pared by *Churchill*, the elder, and of the Agreement concluded, on his decease, between the Defendants, and that an Account might also be taken of all Sums of Money advanced and paid by *Churchill*, the elder, and *Churchill* the younger, or either of them, to or for the use of *Field*, and of the Payments made by *Field* in respect thereof, or of the Interest thereof, and that Interest at Five per Cent. might be computed on such Advances, from the dates thereof: and that what, on taking the said Accounts, should be found due, to the Plaintiffs as such Assignees as aforesaid, from the Defendant *Field*, might be answered and paid by him.

To the discovery sought by the Allegations in the Bill which are included in inverted commas, and to the relief prayed in respect thereof, the Defendant *Field* pleaded the Statute of Limitations, (21 James 1, c. 16,) in the usual manner. The Plea then proceeded as follows:

“ And this Defendant, for further Plea, saith, that, by an Act of Parliament, made and passed in the 9th year of the reign of King Geo. 4 (a), intituled: ‘ An Act *for rendering a written Memo- [*17]
randum necessary to the validity of certain Promises and Engagements,’ it was enacted that, in Actions of Debt or upon the Case, grounded upon any simple Contract, no acknowledgment or promise, by words only, should be deemed sufficient evidence of a new or continuing Contract, whereby to take any Case out of the operation of the enactments in the Act of the 21st year of the reign of King James the 1st, or either of them, or to deprive any Party of the benefit thereof unless such acknowledgment or promise should be made or contained by or in some writing to be signed by the party chargeable thereby. And this defendant, for further Plea, saith that he, this Defendant, hath never, at any time within six years next before the filing of the said Bill, or within six years next before suing out Process against this Defendant to appear to and answer the said Bill, signed any writing by or in which any acknowledgment or promise of, or in relation to the matters hereinbefore pleaded unto, or any part thereof, was or is made or contained. And this Defendant hath not, nor hath nor have any Person or Persons, for him, or on his account or behalf, or by his order, at any time within six years next before the filing of the said Bill, or next before suing out Process as aforesaid, paid, or caused to be paid any Principal Money or Interest on account of, or for, or upon, or in respect of any such Sum or Sums of Money or alleged Sum or Sums of Monies as aforesaid, or any part thereof.” The Defendant, *Field*, then answered the Residue of the Bill.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Wright*, appeared in support of the Plea, and Mr. *Pepys* and Mr. *Swanston* in support of the Bill.

*The VICE-CHANCELLOR :

[*18]

I think the Plea must be overruled, because it is made appli-

(a) C. 14.

1831.—Mason v. Hamilton.

cable to the joint Advances of *Samuel Churchill* the elder, and *Samuel Churchill* the younger, and the separate Advances of each of them, to the Defendant *Field*; and though it might have been good as to the separate Advances made by *Samuel Churchill*, the elder, and the separate Advances of *Samuel Churchill* the younger, prior to the death of the former, I think that no Account could have been taken, properly, of the Partnership dealings of the three, without an account of the Advances jointly made by *Samuel Churchill* the elder, and *S. Churchill* the younger, to the Defendant *Field*; and no Account could have been taken of the Partnership dealings of *Samuel Churchill* the younger, and the Defendant, *Field*, without an account of the Advances made by *Samuel Churchill*, the younger, after the death of *S. Churchill* the elder, to the Defendant, *Field*. The Plea therefore, covers too much, and must be overruled*.

[*19]

*MASON v. HAMILTON.

1831 : 5th December.—*Interpleader*.—*Costs*.

A. delivered Goods to *B.* a Wharfinger, to be kept for him; and afterwards directed *B.* to transfer them to *C.* which was done. *D.* then gave notice to *B.* not to deliver the Goods to any one but him, and thereupon *B.* refused to deliver the Goods to *C.* upon which *C.* brought Trover against *B.* and *B.* filed a Bill of Interpleader. Afterwards *D.* abandoned all Claim to the Goods and withdrew his Notice. Held that the Case was a proper Case of [1] Interpleader, and that *D.* who had occasioned the Suit, must pay to the Plaintiff, and the other Defendants, their Costs at Law and in Equity.

In April 1831, the Defendant *Livermore* delivered ten Casks of Paints, which he represented to be his Property, to the Plaintiff, who was a Wharfinger in *Lower Thames-street*, to be housed and kept, by him, for *Livermore*. Shortly afterwards *Livermore* directed the Plaintiff to transfer the Goods into the Name of the Defendant *Hamilton*, and to hold the same for him, which the Plaintiff accordingly did. On the 28th of May 1831, the Defendants *Emmerson*, *Price* & *Cox*, who were the Assignees of one *Burton* a Bankrupt, gave the Plaintiff notice not to deliver the Paints to any one but themselves. The Plaintiff having, in consequence of the Notice, refused to deliver the Goods to *Hamilton*, he, in June 1831, brought an Action of Trover against the

* Affirmed by the Lord Chancellor, 21st December 1832.

[1] As to what cases are proper cases for interpleader, see *Crawshay v. Thornton*, 7 Sim. 391. *Atkinson v. Manks*, 1 Cowen R. 691. *Hoggart v. Cutts*, 1 Craig. & Phill. 204. *Crawshay v. Thornton*, 2 Myn. v. Craig. 119. *Bignold v. Audland*, 11 Sim. 23. *Glyn v. Duesbury*, 11 Sim. 139. *Shaw v. Costar*, 8 Paige, 339. See also Mr. Dunlap's note 1 to *Crawshay v. Thornton*, 2 M. & Cr. on page 24—and note to *Warrington v. Wheatstone*, 1 Jacob, 206.

1831.—*Mason v. Hamilton.*

Plaintiff; whereupon the Bill was filed stating that the Plaintiff had no Interest in the Goods, except his Lien for Wharfage and Warehouse Rent, and praying that the Defendants might interplead together touching the Goods, and that *Hamilton* might be restrained from proceeding with his Action.

Hamilton, in his Answer, stated that *Livermore* had made over the Goods to him, in satisfaction of a Debt; and insisted that the Bill had been unnecessarily filed, and that the Plaintiff ought to have delivered up the Goods to him, without filing the Bill.

The Defendants, *Emmerson, Price & Cox*, by their Answer, said that, having found that they had no means of establishing, by Evidence, any Interest in the Goods, they, subsequently to the filing [*20] of the Bill, informed the Plaintiff's Solicitor that they claimed no Interest in the Goods, and withdrew their Notice: and, they disclaimed all Interest in the Goods, and submitted that the Bill ought not to have been filed, and that no Case of Interpleader was stated thereby.

On the Notice being withdrawn, the Plaintiff offered to deliver the Goods to *Hamilton*, on being paid his Costs at Law and in Equity, but *Hamilton* declined the offer. The Plaintiff then gave notice of a Motion that the Goods might be sold, and that the Proceeds, after deducting the Expenses of the Sale, might be paid into Court. Before the Motion was made, it was arranged that the Cause should be heard with the Motion.

Mr. *R. Roupell* for the Plaintiff.

Mr. *Pattisson* for the Defendant, *Hamilton*.

Mr. *Rethell* for the Defendants *Emmerson, Price & Cox*.

It was contended, for the Defendants, that the Case stated by the Bill, was not a Case of Interpleader, and *Cooper v. De Tastet (a)* was relied upon.

No Counsel appeared for the Defendant *Livermore*, who was considered as a merely formal Party, and had not been served with Process.

The Vice-Chancellor, after stating the facts of the Case, said that there was no opposition made to *Hamilton's* claim, either [*21] by *Emmerson, Price & Cox*, or by *Livermore*, who had given up all Claim to the Goods: that the Bill stated a plain Case of Interpleader: that it did not appear on what ground *Emmerson, Price & Cox* founded their Claim; but that, consistently with the facts stated, they might have had a right to the Goods prior to *Livermore's*, and, if they had brought an Action of Trover against the Plaintiff, they must have recovered: that, but for the Notice, the Goods would have been parted with; and that, in an Inter-pleading Suit, where there is no Fund in Court, and the cause of

(a) Tamlyn's Rep. 177. But see *Pearson v. Cardon*, ante, vol. iv. p. 218.

1831.—Benson v. Whittam.

The Testator died on the 3d of April 1827. the institution of the Suit can be traced to one of the Defendants, that Defendant must pay the Costs of the Plaintiff and of the innocent Defendants, as was ordered in *Aldrige v. Mesner* (b); *Dowson v. Hardcastle* (c); and *Edensor v. Roberts* (d); in which last Case the Minutes of the Decree were wrong, and varied from the Order pronounced by the *Lord Chancellor*, by directing the Plaintiff to pay the Costs of two of the Defendants, in the first instance, and then to have those Costs again, together with his own, out of the Fund in the Cause; whereas the *Lord Chancellor* had directed one of the Defendants to pay the Costs of the Plaintiff and of all the other Defendants: that, accordingly, in this Case, the Defendants *Emmerson, Price & Cox*, who had occasioned the Suit, must Pay to the Plaintiff, and to the Defendants *Hamilton* and *Livermore*, their Costs both at Law and in Equity, and the Plaintiff must deliver the Goods to *Hamilton* [1].

[*22]

*BENSON v. WHITTAM.

HEMMING v. WHITTAM. (a)

1831: 14th December.—Will.—Construction.—Trust.

Testator gave Annuities out of any Money arising from whatever Dividends he might die possessed of in the Bank of England, and the Residue of the said Dividends to his Brother, A, to enable him to assist such of the Children of his Brother F. as he should find deserving of Encouragement, and, upon the demise of the Annuitants or any of them, the Testator gave each Annuitant's proportion of the before mentioned Dividends, to his Brother, A, to be at his disposal, but the Principal to remain in the Bank. Held that no Trust was created for the Children of F, but that A. took, absolutely, the Capital of the Testator's Stock, subject to the Annuities.

JOHN BENSON made his Will, in his own handwriting, dated the 30th of May 1822, and in the following words: "I give and bequeath unto my Niece, *Maria Foster*, for her own sole use and disposal, the Dividend arising on my Share as a contributor to the joint stock of the Corporation of the Amicable Society for a perpetual Assurance Office: to *Sarah Acres*,

(b) 6 Ves. 418.

(d) Ibid. 231, and see *Cowen v. Williams*, 9 Ves. 108.

(c) 2 Cox, 279.

(a) See the Report of this Cause on the Hearing, in Vol. ii. page 493.

[1] The plaintiff in interpleader must be the costs of any proceedings which he may take in the suit that are productive of needless expense. In a case where the plaintiff filed affidavits, verifying the statements of the bill, and entered into evidence in the cause, and obtained a second injunction, ex parte to retain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred. *Crawford v. Fisher*, 1 Hare, 436.

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Spinster (who has been brought up in my family from her infancy) so long as she remains unmarried, the Sum of 200*l.* per Annum, for her sole and separate use, to my Niece, *Mary Parsons*, 200*l.* per Annum, for her sole and separate use, and, after her decease, to be equally divided amongst her three Children, or the survivor or survivors of them, and, to the Widow of my Brother *Francis Benson*, of the City of *York*, Shoemaker, 50*l.* per Annum, out of any Money arising from whatever Dividends I may die possessed of in the Bank of *England*, and the residue and remainder of the said Dividends, to my Brother, *Arthur Benson*, (to enable him to assist such of the Children of my deceased Brother, *Francis Benson*, as he, the said *Arthur Benson*, may find deserving of encouragement) (b), to be paid to the said several Persons as the same shall become due; and, upon the demise of the said *Sarah Acres*, *Mary Parsons* and her three *Child- [*23] ren, and the Widow of my Brother *Francis Benson*, or any of them, I bequeath, each such Person's proportion of the before-mentioned Dividends, to my said Brother *Arthur Benson*, to be at his disposal, but the Principal to remain in the Bank: and I also give and bequeath, to the said *Sarah Acres*, and my beforementioned Niece, *Mary Parsons*, to be divided equally between them (exclusive of what I have before bequeathed unto them) all my Household Furniture in Town and Country, Plate, Watches, Linen, China, Notes, Bonds, ready Cash, Live Stock and Carriages (if any), and all Monies due and owing to me, except what Money may be in the hands of any Banker, and 1,000*l.* lent by me to the Trustees for repairing *Peterborough Church*, which I bequeath to my said Brother, *Arthur Benson*, together with the Lease or Leases of any Dwelling-house, Land or Houses that I may have, they the said *Sarah Acres* and *Mary Parsons* defraying, or causing to be defrayed my just Debts and Funeral Expenses, and paying, to each of my Executors, the Sum of 100*l.* for their trouble in executing this my last Will and Testament, also 200*l.* to Mrs. *Hannah Benson*, of *Hull*, Widow, to enable her to put out her four Children to some Profession, whereby they may be enabled to gain a livelihood, and likewise 20*l.* to *Sarah Collins*, Spinster, and her Sister, *Frances Stuart*, and to Mr. *Daniel Denny*, Silversmith, to purchase Mourning. I likewise give and bequeath, to my said Brother, *Arthur Benson*, all my Parliamentary Books, Fire-arms, Fishing-rods and Tackle thereunto belonging, together with my Walking-sticks and Canes, and, to the Children of my Brother *Francis Benson*, all my Wearing Apparel, Shoes and Body Linen, to be equally divided amongst them, and I do appoint my said Brother, **Arthur Benson*, [*24] and *George Whittam*, Esquires, Executors of this my last Will and Testament.

(b) In the original Will, these words were in a parenthesis.

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It appeared, by the Master's Report, that *Arthur Benson*, and Mrs. *Parsons* and the five other Children of *Francis Benson*, (all of whom were Defendants,) were the Testator's Next of Kin at his death, and that they were in humble conditions of Life; and that the Testator, at the date of his Will, was possessed of 23,000*l.* Stock, in the Three per Cents and Four per Cents, and at his Death of 27,500*l.* Stock in the Three and Three and a Half per Cents.

The Causes now came on to be heard for Further Directions; and the Questions were, 1st, whether *Arthur Benson* was entitled, absolutely, to the Testator's Stock, subject to the payment of the Annuities: 2d, whether the Will created a constructive Trust for the Children of *Francis Benson*: 3d, whether any part of the Capital of the Testator's Stock, passed under the Bequest to *Sarah Acres* and *Mary Parsons*.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Wright* for the Executors of *Arthur Benson*, the Plaintiff in the original Cause who had died pending the Suit:

The Testator has made an indefinite Gift, of the Dividends of his Stock, to his Brother *Arthur Benson*, and, consequently, the Capital of the Stock passed by that Bequest. *Phillips v. Chamberlain*, (c), Page v.

**Leapingwell* (d), *Adamson v. Armitage* (e) *Stretch v. Watkins* [*25] (f). 2d, It appears, by the Master's Report, that the Children of *Francis Benson* were all in low situations of Life, and the Testator shows that he knew them to be so, by bequeathing to them his Shoes and other Articles of Wearing Apparel. The Testator could not have intended that they should take the large Sum of Stock which he left behind him. He meant that *Arthur* should take it absolutely, and that it should be left to his discretion to assist such of the Children of *Francis*, as he should find deserving of Encouragement. One of two constructions must be put upon this Bequest, either *Arthur* must take the absolute Interest in the Stock, with a discretion as to assisting such of *Francis's* Children as may be deserving of Encouragement; or he must be a Trustee of the Stock, for the Children equally, however unworthy they may be of the Testator's Bounty. There is no Case where Property has been given to a near Relation with a discretion as to assisting certain Objects, in which it has been decided that the Party has taken anything but an absolute Interest in the Property. The Testator clearly intended a Benefit to his Brother *Arthur*. As each of the Annuitants dies, the Dividends which were applicable to the payment of the deceased Person's Annuity, are to be at his disposal. If he is to be converted into a Trustee, there is nothing in the Will to give him even a Life

(c) 4 Ves. 51.

(d) 18 Ves. 463.

(e) 19 Ves. 416; S. C. Coop. C. C. 283.

(f) 1 Madd. 253.

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Interest in the Stock : and, if the Testator had had no other Property than the Stock, *Arthur* would have taken nothing under the Will, and the Children would have been enabled to assist *Arthur*. The [*26] words "to enable him, &c." impose no obligation ; but leave it entirely to *Arthur's* discretion to assist such of the Children of *Francis* as he may find deserving of Encouragement. There is nothing in the Will, which points out which of the Children the Testator intended to benefit, or what Shares of his Stock he meant them to take. The Bequest, therefore, must be held to be an absolute Bequest to *Arthur*, leaving it discretionary in him to give what he might think proper to such of the Children of *Francis* as he might find deserving of Encouragement. *Wright v. Atkins* (g), *Salé v. Moore* (h) *Meredith v. Heneage* (i).

The Solicitor-general and Mr. *Jeremy*, for the Defendant, *Sarah Acres* :

1st. It is impossible to maintain that *Arthur Benson* is entitled to that Stock absolutely. The Dividends only are given to him for a particular purpose, and the Principal is to remain in the Bank ; so that he could not touch the principal. Stock may pass under the word "Money:" and it appears, from the expressions used by the Testator, that, when he was speaking of Money, he meant Money in the Funds. He calls the Capital of his Stock "Principal." Now the word "Principal" is not applicable to Stock, but to Money. He directs Annuities to be paid out of any Money arising from whatever Dividends. So that when he spoke of his Stock, he spoke of it as Money arising from the Stock. **Gallini v. Noble* [*27] (k), *Bescoby v. Pack* (l), *Kendall v. Kendall* (m).

The Bequest to *Sarah Acres Mary* and *Parsons* is a Residuary Bequest. The burden which the Testator throws on them, is a burden which the Law throws on the general bulk of the Estate. He imposes on them the whole onus of the administration of his Property : so that, *quacunque via*, *Sarah Acres* and Mrs. *Parsons* will take the Capital of the Testator's Stock. The Executors cannot take it, for Legacies are given to them, expressly, for their trouble : so that, if the Court holds that it does not pass to Mrs. *Acres* and Mrs. *Parsons*, it is undisposed of, which is a conclusion that the Courts never come to if it can be possibly avoided.

Mr. *Pepys* and Mr. *Barber*, for the Defendant, *Mary Parsons* :

Mrs. *Parsons* has three different Titles : 1st, as one of the Testator's

(g) In House of Lords. It appears from the Report of this Case in 1 Turn. & Russ. 143, that the Decisions of the Master of the Rolls and Lord Chancellor, 17 Ves. 255, and 19 Ves. 299, were reversed on the Appeal.

(h) *Ante*, vol. i. p. 534.

(i) 1 Sim. & Stu. 500.

(j) *Ibid*, p. 542.

(m) 4 Russ. 360.

(k) 3 Mer. 691.

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Next of Kin, with which we shall not trouble the Court: 2d, as one of the Children of *Francis Benson*: and, 3d, under the Residuary Clause.

The Will creates a Trust of Residue of the Stock, for the Children of *Francis Benson*, after a sufficient Portion of it is set apart to pay the Annuities. *Adamson v. Armitage* (n). In *Brown v. Casamajor* (o), it was held that a Trust was created by words which are almost identical-
[*28] ly the same as those used, by the Testator, in "this Case. The words were: "To enable him to provide for his younger Children."

The only difference is that "provide" is used instead of "assist:" the word "enable," on which the question turns, occurs in both Cases. Here both the subject and the objects of the Trust are certain. *Birch v. Wade* (p), *Parsons v. Baker* (q), *Sale v. Moore* and *Meredith v. Heneage*, are dissimilar to the present Case. In the former, the Testator apologises for not leaving anything to his Brother and elder Sister; and, in the latter, the Property was given to the Wife, "unfettered and unlimited."

There are no words in the Clause now under consideration, from which it can be implied that the Testator intended that *Arthur Benson* should derive any benefit from the Residue of the Dividends. He has a discretion as to how the Dividends are to be applied to assist the Children of *Francis Benson*, but no discretion as to whether they are to be applied or not. When the Testator intended a benefit to *Arthur*, he knew how to express it. The Funds for payment of the Annuities, are to be at his disposal, as the Annuitants die. It cannot, therefore, be supposed that what was contained in the previous part of the Gift, was to be at his disposal.

If the Court should hold that the Trust which we contend for, fails for uncertainty, then that portion of the Stock, which is not required for payment of the Annuities, passes, to *Sarah Acres* and Mrs. *Parsons*, under the Residuary Clause.

[*29] "Mr. *Treslove* and Mr. *Purvis*, for the Children of *Francis Bacon*, except Mrs. *Parsons* :

Arthur Benson took the whole of the Stock that was bequeathed to him, imprest with a Trust for the benefit of the Children of *Francis*. If *Arthur* was not intended to be a trustee of the Stock, why did the Testator direct that the Capital should remain in the Bank? *Doley v. Attorney-General* (r), *Brown v. Higgs* (s), *Harding v. Glyn* (t), *Birch v. Wade* (u).

[The *Vice-Chancellor* :—It is clear that the words, "to be paid," do not apply to the Children. In the original Will, the words, "to enable him to

(n) 19 Ves. 416. (o) 4 Ves. 498. (p) 3 Ves. & Beam. 198. (q) 13 Ves. 476.

(r) 2 Eq. Ab. 194; 4 Vin. Ab. 485; and See 7 Ves 58, note, and 16 Ves. 47.

(s) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192.

(t) Atk. 469. See Sugd. Treat. Pow. 3d Edit. 318, where the Cases above cited are observed upon. See also 16 Ves. 47.

(u) 3 V. & B. 198.

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assist such of the Children of my deceased Brother *Francis Benson*, as he the said *A. Benson*, may find deserving of Encouragement," are in a parenthesis; and, admitting that those words create a Trust, what words are there to connect the subsequent Gift with the former?]]

If there is any portion of the Stock, as to which no Trust is created for the Children of *Francis Benson*, then we submit that *Arthur Benson*, takes a Life Interest only in it, and that the Capital is undisposed of, and consequently, belongs to the Testator's Next of Kin. It is clear that the Bequest to *Mary Parsons* and *Sarah Acres* is specific and not residuary; and there are no words in that Clause of the Will which can be held to pass the Stock. The context of the Will explains "what the [*30] Testator meant by the word "Monies." Besides *Hotham v. Sutton* (x), decided that Stock will not pass by the word "Money."

The VICE-CHANCELLOR :

The first question in this Case, is whether a Trust is created, for the benefit of the Children of *Francis Benson*, by the following Clause in the Will of his Brother, *John Benson*: "And the Residue and Remainder of the said Dividends to my Brother *Arthur Benson*, (to enable him to assist such of the Children of my deceased Brother *Francis Benson* as he, the said *Arthur Benson*, shall find deserving Encouragement), to be paid to the said several Persons." The words, to enable, &c." are as I before observed, in a parenthesis; and consequently the words "to be paid, &c." apply, not to the Children of *F. Benson*, but to the Persons to whom the Testator had given the Annuities in the preceding part of his Will.

I am not aware that there is any Case, where there is a Gift to a Party, apparently in terms which would make him the taker so as to have a benefit, and words have been connected with it which express the reason for which it was given, such as these, "to enable him to assist such of the Children of my deceased Brother *Francis Benson* as he, the said *Arthur Benson*, shall find deserving of Encouragement," in which the Court has held that a Trust was created for those Persons. The Cases that have been Cited, are cases where Property has been given to a Legatee, with a Power to select one or more of a specified class of Persons, to take the *Property after the decease of the Legatee. As in *Harding v. [*21] Glyn*, where the Testator gave the Lease of his House and certain other Articles, to his Wife, but desired her, at or before her death, to give the same unto and amongst such of his own Relations as she should think most deserving and approve of. In such Cases the Court has held, if the Power be not exercised, that a Trust is created in favour of those Persons who were pointed out as the objects of the Power. In the Case of

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Brown v. Casamajor, the words were : “ I also give to the said *Humphrey Sibthrop*, the further Sum of 7000*l.* the better to enable him to provide for his younger Children ; and, if he should depart this life before, or I be rendered incapable, in case of accident, to make any alteration, then I give the said Sum of 7,000*l.* to *Susanna Sibthrop*, his Wife, for the purposes aforesaid, and if both of them should die before me, I give the same among the younger Children.” In that Case, the Court held that the Father was entitled to the Interest of the 7000*l.*, for his life ; and that his younger Children had an interest in the Principal. It seems rather extraordinary that any question should have arisen upon that Bequest ; for is perfectly plain that the Father was entitled to the Fund for his life, and that he had a Power to dispose of the Principal in providing for his younger Children ; and, if he did not exercise that Power, then the Fund was given, expressly, to the younger Children. In the Case of *Brown v Higgs*, the Testator expressed himself thus : “ I authorise and empower my said Nephew, *John Brown*, to receive the remainder of the Rent that arises from my Estate at *Brize Norton*, over and above the 100*l.* I have directed to be paid to my loving Wife *Rupertia Brown*, and to dispose of it in the following manner, that is to say, to take 100*l.* of it, every year, to his sole and separate use, and to employ the remainder of the said Rent, after paying the annual Rent to the College and the Fines for the renewal of the Leases, and other necessary Expenses about the Farms, to such Children of my Nephew *Samuel Brown* as my said Nephew *John Brown* shall think most deserving, and that will make the best use of it, or to the Children of my Nephew *William Augustus Brown*, if any such there are or shall be.” *John* died in the lifetime of the Testator ; and it was held that a Trust was created for the Children of *Samuel*, and according to Lord *Eldon*’s construction, for the Children of *William Augustus Brown* also, about which, I think there could not be any doubt.

I do not see that there is any similarity between Cases of that kind and the present Case, where, in the first instance, the Gift to *Arthur Benson*, and then the Testator has added apparently the cause of the Gift : “ to enable him to assist such of the Children of my deceased Brother *Francis Benson*, as he the said *Arthur Benson* shall find deserving of Encouragement.” It is clear to me that the Testator intended to increase the Funds of *Arthur Benson*, whereby, if he pleased and thought that there were any of the Children of *Francis Benson* that deserved Encouragement, he might be better able so assist them. I do not see any reason for departing from the natural import of the words used by the Testator : and, more especially as the natural construction of those words is fortified by what follows. The Testator goes on to say : “ and upon the demise of the said *Sarah Acres*

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and *Mary Parsons*, and her three Children, and the Widow of my Brother *Francis Benson*, or any of them, I bequeath such Persons' proportion of the "before-mentioned Dividends, to my said Brother [*33] *Arthur Benson*, to be at his disposal." That, according to my apprehension, is a complete Gift for the benefit (that is, for the free disposition) of *Arthur Benson*; and, if the objects of the Testator's bounty, were not *Arthur Benson*, but the Children of *Francis*, how does it happen that there is no allusion made to the Children of *Francis* in this bequest. My opinion therefore is, that the words which have been relied upon, are not, of themselves, sufficient to raise a Trust for the benefit of the Children of *Francis Benson*.

The next question is, what is the quantity of Estate and Interest, which *Arthur Benson* takes in what is given to him? The two Clauses which I am going to advert to, throw light upon each other. The Testator, in the first instance, has given a Fund, in one long sentence, which ends with the words: "but the Principal to remain in the Bank." That sentence commences with giving an Annuity to *Sarah Acres*, who was the Testator's adopted Child, another Annuity to his Neice, *Mary Parsons*, who was one of the Children of his Brother *Francis*, and then the Will proceeds thus: "and, after her decease, to be equally divided amongst her three Children, or the Survivor or Survivors of them; and to the Widow of my Brother *Francis Benson*, 50*l.* per annum, out of any money arising from whatever Dividends I may die possessed of in the Bank of England." I should have thought that those words, if they had stood alone, would have carried to *Sarah Acres*, the Widow of *Francis Benson*, and the three Children of Mrs. *Parsons*, the absolute Interest in the Funds requisite for payment of their respective Annuities. But afterwards the Testator has explained what he meant by "these words, for he says: "And [*34] upon the demise of the said *Sarah Acres*, *Mary Parsons*, and her three Children, and the Widow of my Brother *Francis Benson*, or any of them, I bequeath each such Person's proportion of the before-mentioned Dividends to my said Brother *Arthur Benson*, to be at his disposal." If, as has been contended, the Testator meant to give his Brother a Life Interest only in his Stock, a portion of it would be, first of all, to be enjoyed, for life, by the Niece of his Brother, and then by Persons who were the great Nieces and Great Nephews of his Brother; so that, as to that Portion, the Brother would take a Life Interest, in remainder, after the death of Persons who were in the second generation from him. *Prima facie*, that appears to be a very extraordinary intention to have entered into the Testator's mind; and it seems to me to fortify the conclusion which I have come to, as to the effect of this disposition, namely, that the Testator, when he so gave, in remainder, to his Brother *Arthur*, the Fund that was to produce the Annuities,

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meant to give him the absolute interest in that Fund. If then the Testator intended to give, to his Brother, the absolute interest in the Fund which was to produce the Annuities, it aids the conclusion that when, in the preceding part of the sentence, he says: "the Residue and Remainder of the said Dividends to my Brother *Arthur Benson*," he means to give him the absolute Interest, that is, the Capital that was to produce the Dividends.

I am therefore of opinion that what the Testator meant, was that, in the first instance, *Arthur Benson* should take, absolutely, so much of the Stock as might not be wanted to answer the Annuities given to *Sarah* ['35] *Acres, Mary Parsons*, and the Widow of his Brother **Francis*, and that, after the death of the Annuitants, *Arthur* should take, absolutely, the *Corpus* of the Fund out of which those Annuities were to arise.

That being my opinion, there is no other question in the Cause that I have to decide.

DUMMER v. PITCHER.

1831: 19th December.—*Will.—Specific Legacy.—Election.*

A Testator, before making his Will, transferred two Sums of Four per Cents. and Five per Cents. which were then the whole of his Funded Property, into the joint Names of himself and his Wife. By his Will he bequeathed all his Funded Property or Estate of what kind soever, to Trustees, in Trust for his Wife for Life, and, after her decease, in Trust (amongst other things) to pay certain Legacies of Four per Cent. Stock, amounting, within 50*l*, to the Stock of that description, which he had so transferred; and he gave the Residue of his Estate to *A. & B.* He afterwards purchased further Sums of Five per Cents, in the Names of himself and his Wife, and died in her lifetime, having no Stock except that before-mentioned, exclusive of which his Property was not sufficient to pay his Legacies: Held that the Wife, on her Husband's death, became absolutely entitled to the Stock; and that the Bequest of the Testator's Funded Property was not sufficiently specific to make her elect between the Stock, and the Benefits which she took, under the Will, in certain Parts of the Testator's Property.

THOMAS CASS, the Testator in this Cause, being possessed of 2,500*l*. Four per Cent. Bank Annuities, and 2,000*l*. Five per Cent. Bank Annuities, in October 1811 and February 1812, transferred them into the Names of himself and his Wife. He made his Will, dated the 19th of July 1814, in the following words: "First of all I give my Leasehold House and Premises, situate in *South-street, South Audley-street, Grosvenor-square* ; ['36] also my leasehold House and Premises situate and being in *Curzon-street May-fair* ; also my leasehold House and Premises situate and being in *Chapel-street West May-fair* ; and likewise

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my leasehold House and Premises situate and being in *Henrietta-street, Cavendish-square, St. Mary-le-bone*, and all the Rents and Proceeds of the aforesaid four Houses, together with all the Interest of all my funded Property or Estate, of what kind soever, or wheresoever the same, or any part thereof, may be found, I give to *Samuel Dummer*, of *Beech-street*, in the City of *London*, and *William Thomas Sweet*, of *South Andley-street* aforesaid, upon Trust, and to the intent and meaning, that the said *Samuel Dummer* and *William Thomas Sweet*, or the Survivor of them, their Heirs or Assigns of such Survivor, do and shall, from time to time, and at all times hereafter, pay the net Rents and Issues of the aforesaid four Houses and Premises, and also the Interest, Proceeds and Profits of all my funded Property, and all my Estate, of whatsoever kind, as soon and as often as the same, or any part thereof, may become due and payable, into the hands of my beloved Wife, *Mary Cass*, for her own proper Use and Benefit, for and during her natural life, or permit her to receive the same for her sole and separate Use and Benefit, and her Receipt shall be good and sufficient discharge therefore; and from, and immediately after the death of my beloved Wife, *Mary Cass*, then, upon Trust for the said *Samuel Dummer* and *William Thomas Sweet*, or the Survivor of them, the Executor, Administrator or Assign of such Survivor, I give and bequeath in manner following, that is to say, first, to my Nephew, *Joseph Pitcher*, senior, I give and bequeath the sum of 300*l.* Stock Four per Cent., together with my leasehold House and Premises situate and being in **Henrietta-* [37] *street* aforesaid; also I give, to my Nephew *Joseph Pitcher*, junior, the sum of 300*l.* Stock Four per Cents.; also I give and bequeath to my great Nephew, *William Pitcher*, the sum of 300*l.* Stock Four per Cents.; also I give to my great Niece, *Mary Boyden Bevis*, the sum of 300*l.* Stock Four per Cents.; also I give and bequeath to my Niece, *Mary Burren*, the sum of 200*l.* Stock Four per Cents.; also I give and bequeath to my Niece, *Sarah Giddings*, the sum of 200*l.* Stock Four per Cent.; also I give and bequeath to my Sister-in-law, *Margaret Webb*, the sum of 200*l.* Stock, Four per Cent.; also I give and bequeath to my two Sisters-in-law, *Ann Morton* and *Margaret Webb*, an Annuity of 50*l.* each and either of them, and to be paid them out of my Estate, in half-yearly Payments, that is to say, 25*l.* to each of them in each half-yearly Payment, and the Survivor of them, the said *Ann Morton* and *Margaret Webb*, shall and may have the whole Annuity of 100*l.* during her natural life; and, after the death of both my Sisters-in-law, *Ann Morton* and *Margaret Webb*, I then give, and my Will is, that the one Moiety of the principal sum of 2,000*l.*, from which the Annuity of 100*l.* proceeds, I give to the Children of my Niece, *Mary Ann Dummer*, or their Heirs, Share and Share alike, and the other Moiety of the aforesaid principal sum of 2,000*l.*, after the death of my

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said two Sisters-in-law, I give, and my Will is, that the said principal sum of 1,000*l.*, being the Moiety of 2,000*l.* aforesaid, I give to the Children of my Nephew, *Joseph Pitcher*, senior, born by his first Wife, *Elizabeth Pitcher*, Share and Share alike, or to their Heirs, in the like manner. Also I give the sum of 500*l.* Stock, Four per Cents, to my great Nephew, *Thomas Cass Pitcher*, but if the said *Thomas Cass Pitcher* should die

[*38] single or without Issue, *I then give, and my Will is, that the said sum of 500*l.* herein willed or bequeathed to him, said *Thomas Cass Pitcher*, as aforesaid, shall then be equally divided between his, said *Thomas Cass Pitcher's*, two Brothers, *Joseph Pitcher*, *William Pitcher*, and his Sister, *Mary Boyden Bevis*, or the Survivor of them and Survivors, Share and Share alike, or their Heirs or Assigns; also I give, to my Niece, *Mary Ann Dummer*, my leasehold House and Premises situate and being in *South-Street, South Audley-Street, Grosvenor-Square*, which House the said *Mary Ann Dummer* shall have and enjoy immediately after the death of my beloved Wife, *Mary Cass*; also I give, to my Brother-in-law, *Richard Webb*, the sum of 100*l.* Four per Cent.: also I give, to my God-son, *Thomas George Law*, the sum of 50*l.* Stock, Four per Cent.; also I give and bequeath, to the aforesaid *Samuel Dummer* and *William Thomas Sweet*, the sum of 200*l.*, upon Trust that they or one of them, their Heirs or Assigns, pay to the Board of Managers for the time being of the Day School of Instruction and Industry, situate in *South-street, South Audley-street, Grosvenor-Square*, and which said sum of 200*l.* of lawful Money of *Great Britain*, I desire may be paid out of my Estate, and be applied for the better support of the said Charity School: and also I give and bequeath, the sum of 100*l.*, to the School of Instruction or Charity School situate and being in *Knightsbridge*, which said sum of 100*l.* to be paid out of my Personal Estate; and my Gold Watch I give to my great Nephew, *Thomas Cass Pitcher* aforesaid: and as to my other two leasehold Houses and Premises, situate as above, and not before willed or given away, with the Appurtenances thereunto belonging, together with all my household Goods and Furniture, my Will is that they, and every one of them, be

[*39] sold, by *Auction, for the most Money that they may fetch; and my Will is that the said *Samuel Dummer* and said *William Thomas Sweet*, may retain, for their own proper Use and Benefit, the Sum of 50*l.* each and either of them, for their trouble and performance in the duty of fulfilling the Trust herein reposed in them, their Heirs or Assigns. All the rest Residue and Remainder not hereby before willed, I give to the aforesaid *Thomas Cass Pitcher* and the aforesaid *Mary Ann Dummer*, that may be found of my Estate; and I, the Testator, *Thomas Cass*, do nominate, constitute and appoint the said *Thomas Cass Pitcher* and the said

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Mary Ann Dummer for my sole Executor and Executrix to this my Will and Testament.”

In November 1814, and May 1816, the Testator purchased two further Sums of 200*l.* and 100*l.* Five per Cent. Bank Annuities, and had them transferred into the Names of himself and his Wife.

The Testator died on the 10th of September 1817: and his Executor and Executrix having renounced Probate of his Will, Letters of Administration with the Will annexed, were, in November following, granted to *Samuel Dummer* and *William Thomas Sweet*.

The Testator's Personal Estate, exclusive of the before-mentioned Sums of Stock (all of which were, at his Death, standing in the joint Names of himself and his Wife,) was of very little value; and, together with those Sums, it was not more than sufficient to pay his Debts, Funeral and Testamentary Expenses and Legacies, and to perform the Trusts of his Will. The Five per Cent. Bank Annuities *were after- [*40] wards converted, by Act of Parliament, into 2,520*l.* new Four per Cents., and the Four per Cent. Bank Annuities, into the same amount of new Three and a half per Cents.

In 1824 Mrs. *Cass* sold out 500*l.* part of the Four per Cents., and paid over the Proceeds to *Thomas Cass Pitcher*, and he gave to her his Promissory Note for securing 500*l.*, with Interest at Four per Cent.

Mrs. *Cass* received the Rents of the Testator's Houses, during the continuance of the Leases, three of which expired in 1823, and the other in 1828. By her Will, dated the 4th of January 1830, after giving some small specific and pecuniary Legacies, she gave all other her Monies, Goods, and Chattels, Estate and Effects, of every nature and kind, to her Niece, *Mary Ann Dummer*, and appointed *Samuel Dummer* her sole Executor. Mrs. *Cass* died on the 8th of January 1830. At her Death, all the Sums of Stock, except the 500*l.* which had been sold as before-mentioned remained in the joint Names of her and her Husband; but, after her Death, those Sums were sold out by *Samuel Dummer*.

In July 1830 *Samuel Dummer* and *Mary Ann* his Wife, filed a Bill against *Tho. Cass Pitcher* and *Wm. Thos. Sweet* alleging that Mrs. *Cass*, by surviving her Husband, became absolutely entitled to the Sums of Stock, and praying for a Declaration to that effect, and that no part of those Sums constituted Personal Estate of the Testator, or was applicable towards the performance of the Trusts of his Will, and that an Account might be taken of his Personal Estate, and that the same might be applied in a due course of Administration.

*In 1831 *Thos. Cass Pitcher* filed a cross Bill against Mr. [*41] and Mrs. *Dummer* and Mr. *Sweet*, alleging that the Testator had caused the Sums of Stock to be transferred into the joint Names of himself

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and his Wife, with a view to the Bequests and Dispositions of his Will, and to enable his Wife to receive the Dividends thereof, which he, through age and infirmity, was incapable of doing; that the 500*l.* was paid to him, *T. C. Pitcher*, by *Mrs. Cass*, as and for the reversionary Legacy to that Amount, given to him by the Testator's Will, and that he gave her his Promissory Note, for securing the Interest to her, for her Life, and to provide against the contingency, or supposed contingency, to which such Legacy was subjected by the Will. The cross Bill prayed that the Trusts of the Testator's Will might be carried into execution, and that it might be declared that the Sums of Stock formed part of his Assets at the time of his Death: or, if the Court should be of opinion that those Sums vested absolutely in *Mrs. Cass* by Survivorship, then that it might be declared that she was bound to elect whether she would take the Benefits given to her by the Will, or reject the same, and that she did accordingly elect to take such Benefits, and was bound to permit the said Stock to be applied in Execution of the Trust of the Will, according to the intent of the Testator, and that *Samuel Dummer* might be restrained from proceeding with an Action which he had commenced against the Plaintiff, *Thomas Cass Pitcher* on his Promissory Note, the Plaintiff offering to account, as part of the Testator's Assets, for the Proceeds of the Stock sold out and lent to him, and to appropriate and pay the same as the Court should direct.

[*42] *Mr. *Knight* and Mr. *James Russell*, for Mr. and Mrs. *Dummer*, contended, 1st, that the Sums of Stock became upon the Testator's Decease, the absolute Property of his Wife, there being no Declaration of Trust, nor any circumstances appearing either from the Answers or the Evidence in the Cause, from which it could be collected that the Testator intended that his Wife should hold the Stock subject to any Trust, or which afforded any ground for an Inquiry upon the subject: 2d. That the Bequest in the Testator's Will of his funded Property, was not specific, and, consequently, that there was nothing in the Will to raise a Case of Election against his Widow. *Parrott v. Worsfold* (a).

Mr. *Tresolve* and Mr. *Bligh*, for *T. C. Pitcher*, said that the Testator, when he made the Transfers of the Stock, had both legal and equitable Ownership in it, and therefore the inference was that he intended his Wife to be a Trustee of it; that it appeared, by the Answer of Mr. and Mrs. *Dummer*, that the Testator's Property exclusive of his Leasehold Houses and Stock, was very inconsiderable, and did not exceed 83*l.*: that the Leases of three of the Houses, expired in 1823, and the Lease of the fourth, in 1828: that the Testator had no Funded Property, except what had been transferred into the Names of himself and his Wife: that the Transfers were

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made, only to enable the Wife to receive the Dividends, which the Testator on account of bodily infirmity, was unable to do: that the Legacies of Four per Cents. given by the Will, amounted to 2,450*l.*, which was within 50*l.* of the Sum of Four per Cents *standing in the Names [*43] of himself and his Wife, and the Residue was given to *T. C.*

Pitcher and *Mrs. Dummer*: that the Will itself was a sufficient Declaration of Trust, or, at all events, when coupled with the Answers and Evidence, afforded sufficient ground for an Inquiry as to the circumstances under which the Stock was transferred into the joint Names of the Testator and his Wife: that, if the Court should hold that there was no ground for concluding that the Husband intended his Wife to be a Trustee of the Stock, then that the Disposition of it made, by the Testator, was sufficiently specific to raise a Case of Election against her, she having received the Rents of the Testator's Houses, and having taken other Benefits under his Will.

The VICE-CHANCELLOR:

The first question is, whether it is competent to me now to decide the points raised by the Pleadings in this Cause, or whether I ought not to direct further Inquiry to be made upon the subject. On one side it has been alleged that the Wife was a Trustee, for the Husband, of the Sums of Stock which he caused to be transferred into their joint Names; and, on the other, that the Husband did not intend his Wife to hold the Stock subject to any Trust. Now the *onus* of proving the existence of a Trust, lies on those who allege it. But, in this Case, there is nothing to show that the Husband intended that the Transfers should have any operation but what they legally had; and, consequently, it is not competent to me to direct any inquiry as to the circumstances under which those Transfers were made. On the first question, therefore, my opinion is, that *Mrs. Cass*, by surviving her Husband, became absolutely entitled to the Sums of Stock.

*With respect to the second question, I have to observe that it [*44] is apparent, from the language used by the Testator at the commencement of his Will, that he intended to dispose of all his Property, generally. He first mentions his Leasehold Houses, and then he uses words which would comprehend any Stock or any Property; and there is not, in any one of the Gifts, any reference to Stock which he supposed himself to have at the time when he made his Will. In the first place, he was not Owner of the Stock, so as to be able to dispose of it; in the next place, the Disposition which he has made of his Funded Property, is not sufficiently specific to raise a Case of Election.*

* Affirmed by the Lord Chancellor, 16th Dec. 1833.

1831.—Phipps v. Williams.

*PHIPPS v. WILLIAMS.

1831 : 13th & 19th December.—Will.—Construction.—Executory Devise.

Testator devised all his Real Estates to Trustees, in Trust to convey his Lands in *W.* to *A.*, when, and so soon as he should attain 21, but in case he should die under that age and without leaving Issue, then over; and, when *B.* should attain 24, in Trust to convey the rest of the Real Estates to him, on his giving Security for the Annuities given by the Testator, and executing certain Deeds, to the satisfaction of the Trustees; but in case *B.* should die before he attained 24, without leaving Issue, then over. *A.* & *B.* were both Infants at the Testator's death: Held that *A.* took a vested Interest in possession, in the Lands in *W.*, but that *B.*'s Interest in the rest of the Estates was contingent on his attaining 24, and doing the Acts required.

JAMES ACKERS being, as the Bill stated, at the time of making his Will and of his death, seised in Fee Simple, or otherwise well entitled to, various Freehold Lands, Tenements, Chief-rents and Hereditaments,

[*45] *situate in the County of *Lancaster* and elsewhere, by his Will, dated the 13th of April 1822, and duly executed and attested, directed his Debts, funeral Expenses, and the Charges of the Probate and Execution of his Will, to be paid out of his Personal Estate; and he gave to his wife, *Ann Ackers*, the Use and Enjoyment of his capital Messuage or Dwelling-house, with the Land and Appurtenances thereunto belonging, situate at *Lark-hill*, within *Salford*, in the County of *Lancaster*, which he held by Lease under the Earl of *Derby*, and also the use of his Household, and other Goods, Furniture, Plate, and certain other Articles, which should be found in and about his said Dwelling-house at his decease and, in case of the decease of his Wife, before his Interest in the Premises should expire, then he directed that his said Dwelling-house, Land and Premises, and Household Goods and Chattels, should revert to his Executors, and be applicable to the purposes of his Will thereafter set forth concerning his Personal Estate. He then gave several pecuniary Legacies, which he directed to be paid upon the expiration of three Months after his decease. And he gave and devised all his Freehold and Copyhold Messuages, Lands, Tenements, and Moieties, Parts and Shares of Messuages, Lands, Tenements, Rents and Hereditaments, whatsoever and wheresoever situate, standing, lying, arising and being, in the *United Kingdom*, and also all and every his Leasehold Messuages, Lands, Tenements, Rents and Hereditaments, and all other his Real and Personal Estate and Effects, not thereinbefore disposed of, unto and to the Use of *Edward Hobson* and *Benjamin Williams*, their Heirs and Assigns, and for such other Estate or Estates as he had therein respectively, according to the nature and quality thereof, upon

[*46] *Trust as to his said Lands, Hereditaments and Real Estate, that they should keep the same in good repair, and let, set and man-

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age the same to the utmost advantage; and upon further Trust, and he thereby directed, that it should be lawful for the Trustees, at any time or times after his decease, to sell all or any Parts of his said Real Estates (except the Messuage and Premises devised to his Wife, during her Interest therein, and also the Land, Hereditaments and Premises thereafter devised to his God-son, *George Holland Ackers*), and to convey the Fee Simple thereof to any Person or Persons whomsoever, either in Parcels for building upon or otherwise improving the same, at such yearly Chief or other Rents, as his Trustees should think fit; and that, when any of the said Premises should be sold, the Rents to be reserved upon such Sales should be vested in the Trustees upon the Trusts in his Will expressed concerning his Real Estate. And he empowered his Trustees to exchange any of his said Lands and Hereditaments, for other Lands, and to make partition of any Lands of which he was Joint Proprietor: and he directed that the Lands to be taken in exchange or divided, should become vested in his Trustees upon the Trusts of his Will, and that the Monies to arise from the Sale or Sales of his Estates should be added to his Personal Estate: and he declared that the Receipts, of his Trustees, for such Monies, should be sufficient discharges to the Persons paying the same. And, as to, for and concerning his Personal Estate, Money in the Public Funds, and Money out at Interest, Securities for Money, *Rents, Arrears of Rent*, Goods, Chattels and Effects of what nature or kind soever not there-inbefore specifically bequeathed, he thereby gave and bequeathed the same and every part thereof, to the Trustees, their Executors, Administrators and Assigns, upon Trust, in the first place, to pay, there- [47] out, to his Wife, an Annuity of 3,000*l.* for her life, and a further Annuity of 200*l.* a year, in the event therein mentioned, in lieu of Dower and Thirds and all other claims on his Property. The Will then proceeded thus:

“ And as to, for and concerning all my Messuages, Lands, and Premises, situate, lying and being in *Wheelock* in the County of *Chester*, purchased by me from Mr. *Hillidge* and Mr. *Lockitt*, they, my said Trustees and the Survivor of them and the Heirs of such Survivor, shall stand seised and be possessed thereof, in Trust, and to the intent and purpose to assign, convey and assure the same unto my God-son *George Holland Ackers*, eldest Son of my Nephew *George Ackers*, when, and so soon as he, my said God-son, shall attain his age of 21 Years; and also do and shall pay unto my said God-son, *George Holland Ackers*, the Sum of 7,000*l.* of like lawful Money, at and upon his attaining his said age of 21 Years. But, in case my God-son, *George Holland Ackers* shall depart this life before he attains the said age of 21 Years, without leaving Issue of his Body law-

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fully to be begotten, then and in such case the said Messuages, Lands and Premises in *Wheelock*, aforesaid, hereinbefore given and devised to him, together with the said Sum of 7,000*l.*, shall sink into and become part of the Residue of my Real and Personal Estate, and go according to the Disposition thereof hereafter expressed and contained."

"And, as to the rest, Residue and Remainder of my Personal Estate, not by this my Will specifically disposed of, upon Trust that they, my said Trustees, and the Survivor of them, his Executors or Administrators,

[*48] do and shall, after Payment thereof of all my just Debts, Funeral and Testamentary Charges, and all Annuities and yearly Sums of Money, and Legacies, given by this my Will, together with all such Sum and Sums of Money as may be necessary for the Management and Repairs of my Real and Personal Estate, to invest the Overplus in the Parliamentary Stocks or Public Funds of *Great Britain*, or at Interest upon Government Securities in *England*, to be altered and varied as they, my said Trustees or Trustee, shall think proper, and the resulting Income and Produce thereof may be accumulated by way of Compound Interest, until *James Coops*, Son of *Ann Coops* (sometime ago residing in *Salford*), and which said *James Coops* was born on or about the 4th of August 1811, shall attain the age of 24 Years; then upon Trust that they, my said Trustees and the Survivor of them, and the Heirs, Executors and Administrators of such Survivor, shall convey, assign, transfer, pay and make over, by proper and effectual Conveyances, Transfers, Payments and Assurances in the Law, unto the said *James Coops* (upon his giving such Security and executing such Deeds and Assurances as to the satisfaction of the said Trustees, or the Trustee for the time being, or their or his Counsel, shall devise, for the regular Payment of the several Annuities hereinbefore bequeathed) all the Legal Estate and Interest of and in all my Freehold, Copyhold and Leasehold Messuages, Lands, Tenements, Rents and Hereditaments, Moieties, Parts and Shares of Messuages, Lands, Tenements, Rents and Hereditaments, situate, standing, lying, arising and being in the United Kingdom of *Great Britain* and *Ireland* and all other my Real and Personal Estate and Effects whatsoever and wheresoever not hereinbefore given, devised

[*49] and bequeathed, subject, nevertheless, to the Life Estate of my said Wife, in my said capital Messuage or Dwelling-house, Garden, Land and Premises, and the Household Goods and Chattels thereto appertaining and belonging." The Testator then directed his Trustees to place *James Coops* at School, and afterwards at one of the Universities, and to allow him not exceeding 800*l.* per Annum, out of the Income of the Testator's Personal Estate, until he attained 21, and then not exceeding 1,500*l.* per Annum until he attained 24. The Testator then directed that *James Coops* should, from and after his decease, take the surname of "*Ackers*"

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only. “ *But in case the said James Coops shall depart this life before he attains the said age of 24 Years, without leaving Issue lawfully begotten,* then, upon Trust that they, my said Trustees and the Survivor of them, and the Heirs, Executors and Administrators of such Survivor, do and shall, in like manner, assign transfer, pay and make over, by proper Conveyances, Payments and Assurances, subject nevertheless to the payment of the said Annuities and yearly Sums of Money hereinbefore bequeathed, and also to the Life Estate of my said Wife in my House and Premises at *Lark-hill*, unto such Son of the Body of my said Nephew *George Ackers* lawfully to be begotten and hereinafter to be born (exclusive of my said God-son *George Holland Ackers* and his Heirs), when he shall attain the age of 24 Years, all that and those my Real and Personal Estate of what nature or kind soever : and, in default of such Son, in Trust for the third, fourth, fifth, sixth, and all and every other Son and Sons of the Body of my said Nephew *George Ackers* lawfully issuing and hereafter to be born, successively and in remainder one after another, as they and every of them shall be in priority of birth and seniority of age, the eldest of such Sons and his Heirs being *always preferred, and to take before the younger of [*50] them and their Heirs, such Son and his Heirs lawfully begotten, nevertheless, only to take when he shall have attained the age of 24 Years ;” and in default of such Issue, in Trust for the Daughters of *Georje Ackers* and their Heirs, equally, as Tenants in Common, such Daughters nevertheless only to take when they should have attained 21 : and in case *George Ackers* should die without leaving any Son thereafter to be born, who should attain 24, or any Daughter who should attain 21 Years of age, then upon Trust for *George Holland Ackers* when he should have attained the age of 24 Years. But in case there should be no such Son or Daughter of the Testator’s said Nephew thereafter to be born, or that *G. H. Ackers* should die before his attainment of the age of 24 Years without Issue lawfully to be begotten, upon Trust that his Trustees should equally divide the whole of his Real and Personal Estate, amongst the Children who should be then living of the Testator’s late Uncle and Aunts, *T. Singleton, Elizabeth Hatsall* and *Ann Bayley*. And the Testator appointed *Edward Hobson* and *Benjamin Williams* the Executors of his Will.

Ann Ackers, the Testator’s Wife, died in his lifetime. The Testator died in May 1824, leaving the Plaintiff, *Sophia Phipps*, his Heir at Law, and *George Holland Ackers* and *James Coops*, both Infants, him surviving.

Hobson having renounced and disclaimed, the Bill was filed against *Williams, G. H. Ackers, James Coops* (who had taken the Name of *Ackers*), and the Children of the Testator’s Uncle and Aunts, mentioned in his Will, who were living at his decease. It insisted that the *Plaintiff was entitled to the Rents of the *Wheelock* Estate, from the Tes- [*51]

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tator's death, till *G. H. Ackers* should attain 21, and to the Rents of the whole of the Testator's Freehold Estates, devised to *James Ackers*, from the Testator's death until *James Ackers* should attain 24: and it prayed for a Declaration to that effect; and that an Account might be taken of the Rents of the Estates which had been received, by *Williams*, since the death of the Testator, and that what should be found due from him, might be paid to the Plaintiff, and that proper directions might be given for the future payment of such Rents, until such respective times, and that a Receiver might be appointed.

G. H. Ackers and *James Ackers*, put in, separately, general Demurrers to the Bill.

Sir *Charles Wetherell*, Mr. *Knight* and Mr. *Wright* in support of the Demurrer of *James Ackers*:

The rule of Law is that, if an Estate be devised to a Person when he shall attain 21, and, if he dies under that age and without Issue, then over, the Devisee takes an immediate vested Interest, on the Testator's death; otherwise, if the Devisee died under 21, his Issue, in whose favour an intention is expressed by the Devise, would be disappointed. But, independently of the rule of Law, no one can look at the general context of this Will, without seeing that the Testator meant the Rents and Profits of his Real Estates, and the Interest of his Personalty, to form an accumulating Fund until *James Ackers* should attain 24, subject, however, to the provision for his Maintenance and Education.

[52] "The language of this Will is very inartificial, but there are many expressions in it, which show an intention, on the part of the Testator, not to die intestate as to any part of his Property. The Testator, at the commencement of his Will, gives all his Freehold, Copyhold and Leasehold Estates, and all other his Real and Personal Estate, to his Trustees; every thing, therefore, is given to them; and, under the Trust for Sale, the Trustees may convert the whole, except the *Wheelock* Estate, into Personalty. The Clause directing the accumulation, when taken in connection with the general context of the Will, incontestably shows that the Testator intended that the Rents and Profits of his Real Estate, from the time of his death until *James Ackers* should attain 24 years of age, should be accumulated together with the Income of his Personal Estate: and, after directing the accumulation to take place until *James Ackers* should attain 24, he orders that all his Lands and Hereditaments, and all other his Real and Personal Estate, shall then be conveyed, assigned, paid and made over, to *James Ackers*. It is quite clear that these words pass the intermediate fruits of the Testator's Real as well as Personal Estate; and it would be quite defeating the intention and language of the Will if the Court were to hold that any portion of the Property was to escape the operation of those

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large, and indeed, universal words. *Cambridge v. Rous* (a), *Butler v. Freeman* (b). Although this latter Case related to Personal Estate, the reasoning of the *Lord Chancellor* is equally applicable to Personal Estate.

[The *Vice-Chancellor*:—Do you contend that the Accumulation Clause extends to anything but the Personal *Estate; I do [*53] not find, in any part of the Will, a direction that the Rents of the Real Estates shall be accumulated.]

Independently of the expressions in the Will which we have relied upon, the devise in favour of *James Ackers*, would, of itself, give him a right to the intermediate Rents: and consequently it is not necessary for us to do more than refer to *Borston's Case* (c), *Broomfield v. Crowder* (d), *Doe v. Nowell* (e), *Doe v. Lea* (f), *Goodlittle v. Whitby* (g).

[The *Vice-Chancellor*:—According to your argument, *James Ackers* would take the intermediate Rents of the *Wheelock* Estate, until *George Holland Ackers* attains 21.]

We think that he would; but we have nothing to do with the rights of *G. H. Ackers*. It is sufficient for us to contend, upon this Demurrer, that the Heir at Law does not take anything.

Mr. *Pepys* and Mr. *West* for the Plaintiff:

In *Bromfield v. Crowder*, *Doe v. Nowell*, and the other Cases of the same Class, there were direct Gifts to the Devises on their attaining 21. The decisions in all those Cases proceeded on this, that the attaining of 21 was not a condition precedent.

*The right of *James Ackers* to the intermediate Rents, depends [*54] upon the solution of the following question, namely, is there, or not, a condition precedent annexed to the Estates which he is to take? In the first place, the Testator says that he is to have nothing unless he attains the age of 24 years; and, in the next place, if he does attain that age, he is to perform certain conditions, namely, to give security, in the manner pointed out by the Will, for the due payment of the Annuities, before the Estates are to be conveyed to him. What can more plainly create a condition precedent, than such a form of Devise? Independently of the acts to be done by *James Ackers*, there are no words of Gift to him, except in the direction to convey. The Trustees have the Estate; and, if they find *James Ackers* answering a certain description at a certain time, and if they find him willing to comply with certain directions which the Testator has imposed on him at that time, then, and then only, the Trustees are to convey to him.

(a) 8 Ves. 12.

(c) 3 Rep. 19.

(e) 1 M. & S. 327; 5 Dow, 202.

(g) 1 Burr. 228. See also *Manfield v. Dugard*, 1 Eq. Ab. 195 *Doe v. Moore*, 14 East. 501;and *Duffield v. Duffield*, 3 Bligh, New Ser. 260.

(b) 3 Atk. 58.

(d) 1 New Rep. 313.

(f) 3 T. R. 41.

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If there had been no authorities upon this subject, and the Court had been called upon to give its Judgment merely on the words used by the Testator, no doubt could be entertained as to their effect. In *Duffield v. Duffield* (h) the Devises in favour of the Children of Mr. and Mrs. *Duffield*, were held to be contingent. In that case the Testator, by a Codicil, gave all his Freehold Property, to the eldest Son of his Daughter, on his attaining 21 and changing his name to *Elwes*. There, as in this Case, an act was to be done. The Son was to change his name to *Elwes*. We admit that the Claim of

the Heir at Law to the intermediate Rents, was disallowed by the [*55] House of Lords; but it was disallowed on the ground "that there was a residuary clause. For, when the Case was first sent to the Judges, the residuary clause was omitted, and they decided that the Heir at Law was entitled to those Rents; but, upon that omission being supplied, the Judges determined for the residuary Devisee. It is quite sufficient for our purpose that, on neither occasion, were the Estates held to be vested. The Case of *Chambers v. Brailsford* (i) is also precisely in point.

Next: there is not a single expression in the Will, from which it can be collected that the Testator meant the Rents and Profits of his Real Estates to be accumulated. When he directs the Legal Estate of and in all his Freehold, Copyhold and Leasehold Messuages, Lands, Tenements, Rents, and Hereditaments, to be conveyed, he means the Legal Estate in the Chief Rents of which he was seised. In a preceding Clause, he uses these words, "Rents, Arrears of Rent," and he Devises his Rents, together with his other Real Estates, to the Trnstees, in trust to sell. It is clear, therefore, that the Testator, by the word "Rents," meant Chief Rents. As to the words: "All other my Real and Personal Estate," which have been so much relied on by the Counsel for the Defendant, it cannot be contended that the intermediate Rents pass under the words "Personal Estate." Neither can they pass under the words, "all other my Real Estate." Those words apply to other Real Estates of which the Testator was seised, and not to the intermediate Rents, which are not Real Estate, but the Profits of Real Estate.

[*56] *James Coops* is now an Infant, and has no Children, therefore the question does not arise, what Interest his Children would take if he died under 24, leaving Children. At the present moment, there is nobody who can take these interim Rents, under the Will; the consequence is, that this Suit is properly instituted by the Heir at Law, claiminig those Rents in the absence of any Gift to any other Person.

Sir *E. Sugden* and Mr. *Lynch*, in support of the demurrer of *G. H. Ackers*:

The Testator, in the first place, gives all his Real Estate to his Trustees,

(A) 3 Bligh, New Ser. 260.

(i) 18 Ves. 363.

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so as to vest in them the legal Fee: and the Personal Estate is given to them absolutely. The Trustees have power to convert into Money all the Real Estate, except that which is given to *G. H. Ackers*, and that is to remain *in specie*. The first observation that arises upon the Clause by which the *Wheelock* Estate and the 7,000*l.* are given to *G. H. Ackers*, is that it is only in case *G. H. Ackers* dies before he attains 21, without leaving Issue, that the *Wheelock* Estate and the 7,000*l.* are to sink into and become part of the Testator's residuary Real and Personal Estate. How, therefore, can it be said that, from the beginning, the *Wheelock* Estate and the 7,000*l.* form part of the Residuary Estate, when it is only on the happening of a particular event that they are to become part of the Residue. If a Testator devises an Estate to any given object, and says that, upon the happening of a certain event, it shall sink into and form part of his Residuary Estate, it is plain that, before and up to the happening of that event, the Testator did not intend that it should form part of his Residuary Estate; otherwise he would "have said: "shall again fall into, and again become part [*57] of, my Residuary Estate." It is quite clear, therefore, that this Testator meant to take the *Wheelock* Estate and the 7,000*l.* entirely out of, and keep them distinct from his Residuary Estate, until the happening of a particular event. The Testator, too, has prohibited the Sale of his *Wheelock* Estate. Is it probable that the Testator, making these anxious Provisions respecting this Estate, intended to withhold the enjoyment of it, from the object of his bounty, until the attainment of 21? If *G. H. Ackers* dies under 21, leaving a Child, that Child would take the Property. But it would be singular that a Child should have, before the Father attained 21, that which the Father was not to have until he attained 21. No Provision is made, by the Will, for the maintenance of *G. H. Ackers*; and, if the Rents, until he attains 21, fall into the Residue, it must be in consequence of some rule of law, and not of the intention of the Testator.

The next consideration is, what is the Rule of Law applicable to this Case? The Rule is that, whether the Estate be in Possession or Remainder, if it be devised to a man on the happening of an event, as, for instance, his attaining 21, and if there be a Devise over in case the party does not arrive at that age, the Devisee will take a vested Estate before he attains the specified age, and the Estate will go over if he does not attain that age; because, it is considered that the words are introduced for the sole purpose of limiting the period when he is to take an indefeasible Estate, and not for the purpose of showing an intention of keeping him out of the enjoyment of the Property till that particular event "happens. In [*58] the case of *Edwards v. Hammond* (k) the Ejectment was brought

(k) 3 Levinz, 132; S. C. 1 New Rep. 324, n.

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(as was observed by Lord *Ellenborough* in *Doe v. Moore*) (l), when *John Hammond* was of the age of 15. Now, an Ejectment cannot be brought, on a contingent Remainder, or an executory Devise, but only to recover the Possession: and, in order to maintain the Action, a right to the Possession must be shown, and the recovering in that Action shows that the question was not a vesting so as to make the Estate transmissible, but a vesting for the purpose of immediate enjoyment, subject only to be divested, if *J. Hammond* did not live to attain 21. But, if the Rule had not been as we have stated, it is clear that, in this Case, the Estate would have vested; for it is not merely given to *G. H. Ackers* when and so soon as he shall attain 21: the Testator goes on to say: "But in case he shall depart this life before he attains 21, without leaving Issue of his Body lawfully begotten;" that is not the same event; and therefore, the giving to *G. H. Ackers* a right in one event, and not limiting the Estate over except upon the happening of another event, which, if it happens at all, must occur before the event on which *G. H. Ackers* is to take an indefeasible Estate, render it absolutely necessary that he should take an immediate vested Fee, to enable him, if he should die under 21, leaving Issue, to transmit the Property to his Issue. It is perfectly manifest that the Testator did not intend the Property to go over, if *G. H. Ackers* died under 21 leaving Issue. The Issue, however, could not take, except through him; and he must be seised of some Estate which they could inherit; it is necessary, therefore, [*59] *that *G. H. Ackers* should take an Estate in Fee. *Doe v. Moore* (m), *Doe v. Nowell* (n), *Farmer v. Francis* (o).

The Testator, having vested the whole of his Estates in his Trustees, directs them to convey the *Wheelock* Estate, to *G. H. Ackers*, when he shall attain the age of 21 years. The direction to convey, is equivalent to a Limitation to the Use of, or in Trust for *G. H. Ackers*. *Goodtitle v. Whitby* (p), *Doe v. Lea* (q), *Stanley v. Stanley* (r). The Case of *Chambers v. Brailsford* (s) is an authority in our favour; for there the Rents were disposed of by the Will, otherwise, the first Tenant for Life would have been entitled to them. In *Duffield v. Duffield*, the Estate was clearly contingent: it was not certain that there would be any Son who would attain 21, or that there would be any second Son. That Case cannot be assimilated to the present. Here there is a direct Devise to an Individual in existence.

We submit, however, independently of authority, that it was the plain intention of the Testator, that *G. H. Ackers* should take a vested Estate in possession.

(l) 14 East, 605.

(m) *Ub. sup.*

(n) 1 M. & S. 327; 5 Dow, 202.

(o) 2 Sim. & Stu. 505, and 2 Bing. 151.

(p) 1 Burr. 228.

(q) 3 T. R. 41.

(r) 16 Ves. 491.

(s) 18 Ves. 368.

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Mr. *Pepys* and Mr. *West*, for the Plaintiff:

There is no ground to contend that the Testator had a different intention as to *G. H. Ackers*, from that which he had as to *James Ackers*. We have shown that the Devise to *James Ackers*, had a Condition precedent annexed to it. He was not to take the Estates *unless he attained the age of 24 years, and did certain acts. So *G. H. Ackers* must attain 21, or, dying under 21, must leave Issue, to enable him or his Issue, to take the *Wheelock* Estate. [*60]

Next: the Testator devises the *Wheelock* Estate, and bequeaths the 7,000*l.*, to *G. H. Ackers*, in one and the same Clause. It cannot be disputed that that Clause gives *G. H. Ackers* a future Interest in the 7,000*l.*: can it then be contended that the same Clause gives him a present Interest in the *Wheelock* Estate? There can be no reason to suppose that the Testator, coupling the Real and Personal Fund together, intended the same Person to take a different Interest in one, from that which he would take in the other. He clearly meant that *G. H. Ackers* should have both, on the happening of a particular event, and not till then, and, if that event did not happen, that he should not take either.

In all the Cases of this nature, in which it has been held that the Devisee took an immediate vested Estate, the Court has found sufficient, on the face of the Will, to make the attaining of 21, not a condition precedent, but a condition subsequent, or, in other words, that the age, was the period at which, if the Party did not attain it, the Estate was to go over. But here there is no Gift at all to the Individual. There is a direction to convey, and that only at a certain period. So that the attaining of 21, by *G. H. Ackers*, or leaving Issue if he dies under that age, must necessarily take place before the Trustees can convey the Estate, or pay the 7,000*l.* Until one or other of those events happens, no duty is imposed on the Trustees. Though *G. H. Ackers*, when he attains 21, will have a right to call for a Conveyance, *that does not give him the intermediate Rents. In *Chambers v. Brailsford*, where the Gift depended upon the direction to convey, the Court held that the Party to whom the Conveyance was to be made, had no Title to the intermediate Rents. In *Stanley v. Stanley*, Sir *W. Grant*, M. R., decided that the Estate continued in the Trustees until the Party, who had the vested Estate for life, attained 21. We ask of the Court to make a declaration to the same effect, in this Case. In *Stanley v. Stanley* the argument proceeded, in a great degree, on the Gift over; but the M. R. said that the event on which an Estate was given over, would not determine the event on which it was to vest(*t*). [*61]

(t) See 16 Ves. 506.

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There is no difference between this Case and the Case of *James v. Ackers*, except that, in the latter Case, there are two conditions precedent instead of one; but there is no distinction, in principle between the two Cases.

Mr. *Spence* and Mr. *Hull* appeared in support of a Demurrer which had been put in by the Trustees of the Will; but The *Vice-Chancellor* said that they were Trustees for the Persons entitled, and therefore ought to have remained neuter. At the conclusion of the arguments, his *Honor* said that the Case was one of considerable importance, and that he should look at the authorities before he decided it.

The VICE-CHANCELLOR:

In this Case the Bill was filed by the Testator's Heir, and two Demurrers were put in to it, one by *George Holland Ackers*, and the other [*62] by *James Ackers*; and the question is whether, with respect to the *Wheelock Estate* (which is devised to *George Holland Ackers*), the Heir has any Interest at all. The Testator has not used any words which amount to a Trust for accumulating the Rents and Profits, either of the *Wheelock Estate*, or the general Residue of the Real Estate, prior to the time when the Devisees may become entitled. When the Case was argued before me, I had no doubt upon either of the points that were pressed in argument, but I had not an opportunity of looking through the Will sufficiently to satisfy myself upon the question whether or not a Trust was created for accumulating the Rents and Profits of the Real Estate; but my opinion, on perusing the Will, is that there is no such Trust. The question then is, with respect to the *Wheelock Estate*, whether or not there is such an immediate Devise to *George Holland Ackers*, as that he is entitled to the Rents and Profits of that Estate. The only difference between this Case and *Bromfield v. Crowder*, and the Cases of that class, is this, that, in this Case, there is a Devise of the Legal Estate, vesting the Inheritance in the Trustees, upon Trust, as to the *Wheelock Estate*, to assign, convey and assure the same to *George Holland Ackers*, when and so soon as he shall attain his age of 21 years; and then it is directed that, in case *George Holland Ackers* shall depart this life before he attains 21, and without leaving Issue of his Body, the *Wheelock Estate* should sink into and become part of the Residue, that is, should be subject to such a Devise as affects the Residue of the Real Estate. Now I do not see any substantial difference between this Devise and the Devises in *Bromfield v. Crowder*, *Doe v. Moore*, and *Doe v. Nowell*; and my opinion, therefore, is [*63] that, by force of this Devise, *G. H. Ackers* although he has not attained the age of 21 years, does take an immediate vested Interest in the Estate, liable only to be divested; and the consequence, therefore, is, that he is as much entitled, in Equity, to the Rents and Profits

1831.—Phipps v. Williams.

of that Estate, as the Party, who brought the Ejectment, during his infancy, in *Edwards v. Hammond*, was held entitled to recover by Ejectment. In the course of the argument the Case of *Chambers v. Brailsford* was cited. Now if that Case is rightly decided, it must be right only on the particular expressions in the Will; and certainly the expressions in that Will, do not coincide with the expressions in this. Therefore, it does not, at all, prevent the application of the doctrine in the Cases which I have referred to, to this particular Devise of the *Wheelock* Estate.

But the Residue of the Real Estate is given in a manner totally different; because, the Legal Estate being vested in the Trustees, the Testator notices the accumulation which he has directed concerning (as I clearly think) the Personal Estate only, until *James Coops* shall attain the age of 24 years; and then the Will proceeds: "Then upon Trust, that my Trustees, and the Survivor of them, and the Heirs, Executors and Administrators of such Survivor, shall convey, assign, transfer, pay and make over, by proper and effectual Conveyances, Transfers, Payments and Assurances in the Law, unto the said *James Coops*, (upon his giving such Security, and executing such Deeds and Assurances, as to the satisfaction of the Trustees or Trustee, or their or his Counsel, shall devise, for the regular Payment of the several Annuities hereinbefore bequeathed,) all the Legal Estate and Interest of and in all my said Freehold, Copyhold and Leasehold Messuages, Lands, Tenements, Rents and *Hereditaments and Moieties, Parts * [64] and Shares of Messuages, Lands, Tenements, Rents and Hereditaments situate, standing, lying, arising and being in the United Kingdom of *Great Britain* and *Ireland*, and all other my Real and Personal Estate and Effects whatsoever." Now in this Case, the mere attainment of the age, is not the only thing by which the Testator marks the time at which it shall be determined whether the Estate shall vest, or finally become not liable to be divested; but there is a preliminary Act to be done, without the doing of which *James Ackers* never would be entitled to call for the Conveyance of the Legal Estate: for the Testator has, in express terms, directed that the Conveyance is to take place upon his giving such Security, and executing such Deeds as should be satisfactory to the Trustees, for the purpose of securing the regular Payment of the Annuities. That is, in my opinion, clearly a condition precedent; and, until that be performed, *James Ackers* takes no Interest: and my opinion, therefore, is, inasmuch as there is no Trust for accumulation of the Rents, that the Rents, and Profits of the Residue of the Real Estate, belong to the Heir in the mean time. The consequence, therefore, is that the Demurrer of *George Holland Ackers* must be allowed and the Demurrer of *James Ackers* must be over-ruled. And as to the Demurrer of the Trustees, it should never have been put upon the files of the Court at all.

1831.—Thompson v. Guyon.

[*65]

*THOMPSON v. GUYON.

1831: 15th December.—*Landlord and Tenant*.—*Specific Performance*.—*Covenant to renew*.

A. granted a Lease for 21 years, to B, with a Proviso determining the Lease and giving A. a right of re-entry, on non-performance of any of the Covenants in the Lease, and A. covenanted that, at the end of the Term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a Lease for a further Term of 14 years. B. paid all his Rent and continued in possession after the Term had expired. A. then brought an Ejectment against him for breaches of Covenant during the Term. B. filed a Bill for a specific performance of the Covenant to renew, and for an Injunction to restrain the Action. A, in his Answer, set up the breaches of Covenant, and denied having had notice of them till after the end of the Term. Motion for the Injunction refused.

By an Indenture, dated the 21st of October 1810, *Joseph Debaufre*, by virtue of a Licence, obtained from the Lady of the Manor of *Hampstead*, demised, to *Samuel Thomas Adams*, for 21 years from the 25th of March then last, a Copyhold Messuage and Garden, in *Hampstead*, at the yearly Rent of 25*l.*, payable quarterly; and *Adams* covenanted to cause all the inside and outside Wood and Ironwork belonging to the Premises, to be painted once in every four years of the Term, and twice in the last two years, and to keep the Premises in repair, and yield them up, in good repair, at the end, or other sooner determination of the Term, and to pay the Rent quarterly, and also that he would, at his own Costs or Charges, forthwith insure, and keep insured, during the demise, the Messuage, from loss or damage by Fire, in the joint Names of himself, his Executors, Administrators and Assigns, and of *Debaufre*, his Heirs or Assigns, in the *Royal Exchange* Insurance Office, *London*, in the Sum of 2,500*l.*, and would pay the annual Premiums on such Insurance, and, within 10 days after

[*66] obtaining such Policy or Policies, produce the same, if required, *unto the said *Joseph Debaufre*, his Heirs or Assigns, and deposit and leave the same with him or them, and also deliver and leave, with him or them, the Receipt or Receipts for the annual Premium or Premiums paid thereon, within four days after payment thereof, such Payment to be made within six days after the quarter-day when such Premium or Premiums should become due and payable: Provided that, if the Rent should be in arrear for 21 days, or if *Adams*, his Executors, Administrators or Assigns, should make default in the performance of any of the Covenants therein contained, on his and their part, then, and from thenceforth the Indenture and Demise, and the Covenants therein contained on the part of *Debaufre*, his Heirs, Executors, Administrators and Assigns, should cease, determine and become void to all intents and purposes, and that it should be lawful for him and them to re-enter upon the Premises, or any part thereof in the name

1831.—Thompson v. Guyon.

of the whole, and the same Premises to have again, resume, repossess and enjoy, as in his or their former Estate, and thereout, and from thence utterly to expel, eject and amove *Adams*, his Executors, Administrators and Assigns, and all other occupiers thereof. And *Debaufre*, for himself his Heirs, Executors, Administrators and Assigns, covenanted with *Adams*, his Executors, Administrators and Assigns, that he and they paying the Rent, and performing the Covenants on his and their parts, should peaceably enjoy the Premises during the Term, without any interruption from *Debaufre*, or any Person claiming by, through, from or under him; and also, that *Debaufre*, his Heirs or Assigns, would, at the expiration of the Term, in case the same should not be sooner determined through or in consequence of any act or default on the part of *Adams*, his Executors, Administrators or Assigns *upon the request, and at the Costs of *Adams*, his Execu- [*67] tors, Administrators or Assigns, obtain a further Licence to demise, from the Lord or Lady of the Manor, and execute, to *Adams*, his Executors, Administrators or Assigns, a new Lease of the Premises, for the further term of 14 years, to commence at the end of the term of 21 years, at the like Rent and under the same Covenants as were therein reserved and contained, except any Covenant, on the part of *Debaufre*, for executing any further or renewed Lease thereof.

The Lease, as the Bill stated, had been, some time since, assigned to the Plaintiff; and, on the 3d of October 1823, the reversion of the Premises, expectant on the determination of the Lease, became vested in the Defendant, *John Guyon*, in right of the other Defendant, his Wife.

The term of 21 years expired on the 25th of March 1831. The Plaintiff, however, either by himself or his Tenant, continued in the possession of the Premises. On the 19th of May 1831, the Defendants commenced an Ejectment, against the Plaintiff, to recover possession of the Premises. On the 14th of November 1831 (before which time the Cause had been set down for trial) the Bill was filed, stating that the Rent and Covenants reserved and contained in the Lease, had been duly paid and performed; that, since the expiration of the Lease, the Plaintiff had applied to the Defendants to perform the Covenant for renewal, but that the Defendants, on the ground that some of the Covenants in the Lease had been broken, had commenced an Ejectment on the several Demises of themselves and *Debaufre*, for the purpose of evicting the Plaintiff from *the Premises; that [*68] the breaches of Covenant for which the Action had been brought, appeared, by the particulars thereof, which had been delivered to the Plaintiff, to be for not keeping the Premises in repair, and yielding them up in good repair at the end of the Term, and for not having caused the painting to be done according to the Covenant in that behalf. The Bill charged that

 1831.—Thompson v. Gayon.

all the Covenants in the Lease had been strictly performed, except that part of the inside and outside Wood and Ironwork had not been painted twice within the two last years of the Term; that the omission had arisen from accident and inadvertence, in consequence of the Plaintiff having mislaid the Lease, and forgotten the exact time when it expired; that the Plaintiff had, since, caused the painting to be done, as required by the Covenant, whereby the Covenant had been substantially, though not literally, complied with; that the Defendants ought not to be permitted to take advantage of such accidental omission, especially as they had sustained no damage thereby, and the Plaintiff was willing to make good such damage, if any, as they had sustained. The Bill prayed that the Defendants might be decreed specifically to perform the Covenant for a renewal, and to obtain a Licence to demise, and to grant a Lease to the Plaintiff, pursuant to that Covenant; and, if necessary, that it might be referred, to the *Master*, to ascertain whether any and what damage had been occasioned by the accidental omission to paint the Premises within the last two years of the Term, the Plaintiff offering to pay the Amount thereof, and that the Defendants might be restrained from proceeding with their Ejectment, and from commencing any Action against the Plaintiff, for Damages, in respect of any of the Covenants in the Lease.

[*69] “The Defendants, by their Answer, said that the Rent reserved by the Lease, had, from time to time, been paid to them, but without any knowledge or notice, to either of them, of the breaches of Covenant after mentioned. They then set forth the particulars of the breaches, which had been made, of the Covenant to paint and repair, and added that all such breaches were subsisting before, at, and after the expiration of the Lease, and were, as they were advised, continuing breaches at that time. The Defendants further said that, until Midsummer 1811, the Premises were not insured at all, and that they were then insured for one year only: that, from 1812 to 1820, they were uninsured: that, from Midsummer 1820, to Midsummer 1828, they were insured in the *Phoenix* Fire Office, and that, from Midsummer 1828, to the 25th of December in the same year, they remained uninsured: that, until the 25th of November 1831, they had no knowledge or notice, whatever, that the Messuage had been uninsured at any time during the Term: that, on the 28th of April 1831, a Surveyor employed by the Defendants, had surveyed the Premises, and reported that the Messuage had not been painted, either inside or outside, for a considerable time longer than two years: that the Messuage had been injured, for want of proper care and attention, and by the repeated breaches of Covenant; and they submitted that, under the circumstances, the Plaintiff was not entitled to a renewal of the Lease.

Mr. *Knight* and Mr. *Wright*, for the Plaintiff, now moved for an Injunction to restrain the Ejectment:

1831.—Thompson v. Guyon.

The Plaintiff has no defence to the Action at Law: he has a right in Equity only, under the Covenant to *renew. He ought [*70] to have an opportunity of trying the question at Law; and, wherever there is a reasonable question to be tried, this Court will not allow the possession to be changed. The Plaintiff does not seek, by his Bill, to be relieved against a Forfeiture, but to have the Covenant to renew specifically performed (*a*). There is a broad distinction between the two Cases: and the question is whether the breaches of Covenant alleged in the Answer, ought to deprive the Plaintiff of his right to a Specific Performance. The term of 21 years was suffered to run out, without any Ejectment being brought. We admit that the Court will not decree an Agreement for a Lease to be specifically performed, where the Tenant has been guilty of Waste, or other acts of misconduct (*b*). But here the alleged breaches of Covenant have reference to the term of 21 years; there is no breach as to the Term agreed to be granted. If every Covenant in the Lease had been broken, and the Term had been suffered to continue, the Plaintiff would have a clear right to the renewal. The Covenant in question is a separate, independent and absolute Covenant. The Lessor does not covenant that, the Tenant paying the Rent and performing the Covenants, he will renew: but that he will renew unless the prior Term is determined.

[The Vice-Chancellor:—There is a Proviso making the Term to cease, on breach of Covenant.]

It has been decided, at Law, that that Proviso gives the Land- [*71] lord a right of entry only (*c*). The House was insured before and at the end of the Term; and the Answer admits that all the Rent has been paid. By the Covenant to insure, it was stipulated that the Insurance should be effected in a particular Office, and in the joint Names of the Landlord and Tenant, and that the Tenant should pay the Premiums and leave the Receipts with the Landlord, within certain times. The Landlord then cannot be heard to say that he had no notice of the neglect to insure, and a Receipt of Rent after the times for paying the Premiums and leaving the Receipts, had expired, would be a Receipt after notice.

Mr. *Pepys* and Mr. *E. Montagu* appeared for the Defendants:

But the VICE-CHANCELLOR, without hearing them, delivered Judgment as follows:

It is represented, by the Answer, that, from Midsummer 1820, to Mid-

(a) See *Sanders v. Pope*, 12 Ves. 282; *Hill v. Barclay*, 18 Ves. 56; *Doe v. Peck*, 1 Barn. & Adol. 428; *Doe v. Rowe*, 1 Ryan & Moody, 343; *Green v. Bridges*, ante, vol. iv. p. 96, and the Cases there cited.

(b) See 18 Ves. 62.

(c) See *Arnsby v. Woodward*, 6 Barn. & Cross. 519.

1831.—Thompson v. Guyon.

summer 1828, the Premises were insured in the *Phenix* Fire Office, and that, from Mid-summer 1828, to the 25th of December 1828, they were not insured at all; and the question is whether there is any Equity confessed in this Answer, in respect of which this Court ought to interfere, by Injunction, to restrain the Action which has been brought to recover the possession of the Premises.

The Lease contains a Covenant on the part of the Lessor, that, at the expiration of the term of 21 years, in case the Lease should not be sooner determined in consequence of any act or default of the Tenant, he [*72] would *grant, to the Tenant, a new Lease of the Premises for the further term of 14 years: and it is provided that, if default should be made in the payment of the Rent, or the performance of any of the Covenants in the Lease, the Indenture and Demise, and all the Covenants and Agreements therein contained, should cease and become void, and it should be lawful, for the Landlord, to re-enter on the demised Premises. The fact is, that various breaches of Covenant were committed, by the Tenant, during the Term, which the Landlord might have availed himself of to determine the Lease, by re-entering on the Premises, if he had been conuzant of them. It is expressly sworn, in the Answer, that the Defendants had no notice of the omission to insure the Premises, until the 25th of November last, which is eight months after the expiration of the Term. If, during the existence of a Lease, such a breach of Covenant is committed by a Tenant, as that a Court of Equity would not have interfered to prevent the Landlord from taking advantage of the forfeiture of the Lease, had he known of the breach and proceeded to determine the Lease, he ought not to be placed in a worse situation after the expiration of the Term, than he would have been in had he known of the breach and availed himself of it, before the Term expired: and, upon that ground, I must refuse this Motion.

The Plaintiff afterwards gave the Defendants Judgment in the Action, with a stay of Execution, and amended his Bill, with a view to show that the Defendants had precluded themselves from taking advantage of the breaches of Covenant, by acceptance of Rent and otherwise, after they had [*73] Notice of the breaches. After *the Amendments had been answered, the Plaintiff renewed his Motion before the *Lord Chancellor*.

On the 13th of July 1832, his Lordship made the following Order: That the Judgment obtained by the Defendant, in the Action brought by him, against the Plaintiff, for the recovering of the Leasehold Premises in the Pleadings mentioned, ought to stand; but that the Execution upon the said

 1831.—Williams v. Parkinson.

Judgment should be stayed until the Trial of the Issues after directed shall be had, and the further Order of this Court: That the Parties should proceed to a trial at Law, in the Court of Common Pleas, on or before the Sittings after Easter Term then next, on the following Issues; viz. First, whether *Adams*, his Executors Administrators or Assigns, or any of them, had or not made default in the due observance and performance of any or either of the Covenants contained in the Lease of the 24th of October 1810, on his and their part to be observed and performed: Secondly whether he or they, or any of them, had or not made default in the due observance and performance of any or either of such Covenants and Agreements, of which the Lessor, his Executors, Administrators or Assigns might have availed himself if the Term had not expired; and, if either of the above Issues should be found in the affirmative, then it was ordered that the Parties should proceed to the Trial of the Third: whether the Lessor, his Executors, Administrators or Assigns, had done any act to disentitle himself, or themselves from taking advantage of such default: and the Judge was to endorse any Matter specially on the *postea*; and the Defendants in this Court, were to be Plaintiffs at Law, and the Plaintiff in this Court was to be Defendant at Law.

*The Issues were tried before Lord Chief Justice *Tindal*, on [*74] the 7th of February 1833, when Verdicts were found, for the Plaintiffs at Law, upon each of them: and the Bill was ultimately dismissed with Costs.

 WILLIAMS v. PARKINSON.

1831: 15th December —*Defendant*.—*Contempt*.—*Pro Confesso*.

A Defendant, who was in Contempt for not answering the Bill, on being brought to the Bar of the Court, under 11 Geo. 4, and 1 Will. 4, c. 36, Rule 6, deposed that she was unable, by reason of Poverty, to employ a Solicitor to put in her Answer, upon which the usual reference was made to the *Master*.

The Defendant refused to make any Statement to the *Master*, as to the subject of the Reference. Upon which the Court, ordered Proceedings to be taken under the 2d Rule of the Act, for taking the Bill *pro confesso*, against her.

THE Defendant had appeared to the Bill, but refused to answer it; and she was committed to the Fleet for the Contempt.

On the 23d of November 1830, she was brought to the Bar of the Court, by Writ of *Alias Pluries Habeas Corpus cum Causis*, to answer her Contempt for not putting in her Answer to the Bill; and, having been sworn and examined, pursuant to 11 Geo. 4, and 1 Will. 4, c. 36, s. 15, Rule 6.

1831.—Williams v. Parkinson.

she deposed that she was unable, by reason of her Poverty, to employ a Solicitor to put in her Answer : upon which it was ordered that it should be referred to the *Master*, to inquire and state whether the Defendant was or was not unable, by reason of her Poverty, to employ a Solicitor to put in her Answer to the Bill ; and, in the mean time, it was ordered that she should be remanded to the Fleet.

The *Master* certified that he had been attended by the Solicitor [*75] or for the Plaintiffs, and had caused Notice *to be given, to the Defendant, requiring her to bring in a Statement as to her inability to employ a Solicitor to put in her Answer ; but that the Defendant had not brought in any Statement, nor had any Person appeared before him on her behalf ; and that he was, therefore, unable to ascertain whether the Defendant was, or was not unable, by reason of her Poverty, to employ a Solicitor to put in her Answer.

A Clerk to the Plaintiff's Solicitor, made an Affidavit that he had served the Defendant with a Copy of a Warrant to proceed before the *Master*, and that, at the same time, he explained to her that it was required, by the *Master*, that she should cause to be filed in the *Master's* Office, a Statement, and Evidence in support of it, of her inability to employ a Solicitor in the Cause ; but that the Defendant positively declared that she would not file any Answer to the Bill, or carry any State of Facts into the *Master's* Office. Mr. *Orchard*, a solicitor, also deposed that he had called, several times, on the Defendant, in the Fleet Prison, for the purpose of preparing a short Statement of Facts regarding her inability, by reason of Poverty, to put in an Answer, to enable the *Master* to report thereon ; but that the Defendant declined to carry any State of Facts into the *Master's* Office, or to put in her Answer to the Bill. The Defendant still persisting in her Contempt, on the 15th of December 1831, the *Vice-Chancellor* ordered, on the Motion of Mr. *Cooper*, supported by the above Affidavits, that a Writ of *Habeas Corpus cum Causis*, should issue, directed to the Warden of the Fleet, commanding him, at the return of the Writ, to bring the Defendant to the Bar of the Court, to answer her Contempt ; and the Clerk [*76] in Court for the Plaintiffs, was *then to attend with the Record of the Bill, in order that the same might be decreed to be taken *pro confesso* against her.

His *Honor*, after pronouncing this Order, observed that the conduct of the Defendant, was an aggravation of her original Contempt.

On the 22d of December 1831, the Defendant was brought to the Bar of the Court accordingly, and the Record of the Bill being read, and she still

1631.—Atkinson v. Flint.

persisting in her Contempt, and refusing to put in her Answer, it was ordered that the Bill should be taken *pro confesso* against her*.

Reg. Lib. B., 1831, fol. 594.

* It seems that the Order of the 15th of December was made under the 2d Rule of the Act above referred to. When that Order was applied for, it was doubted whether the 2d or the 13th Rule applied to the Case. See the next Case.

*ATKINSON v. FLINT.

[*77]

1831 : 22d December.—Defendant.—Contempt.—Pro Confesso.

A reference having been made, under 10 Geo. 4, and 1 Will. 4, c. 36, Rule 6, neither the Defendant nor any Person on her behalf, appeared before the Master, though she had been personally summoned. The Master proceeded, *ex parte*, with the Inquiry, and reported that the Defendant did not appear to be unable, by reason of her Poverty, to employ a Solicitor to put in her Answer. The Court refused to order the Bill to be taken *pro confesso*, but referred it back to the Master to review his Report, and ordered the Warden of the Fleet to produce the Defendant before the Master at such time and Place as the Master should appoint, and that the Inquiry should be proceeded with in Defendant's presence.

ON the 10th of August 1831, a reference similar to that in the preceding Case, had been made to the Master. On the 21st of November 1831, the Master certified that he had made the Inquiry in the presence of the Plaintiff's Solicitor, no Person attending on behalf of the Defendant, though she had been personally summoned; and that, on reading an Affidavit made before him on the Plaintiff's behalf, he found that it did not appear to him that the Defendant was unable, by reason of her Poverty, to employ a Solicitor to put in her Answer.

On this day, Mr. Wakefield, for the Plaintiff, applied to have the Bill taken *pro confesso* against the Defendant.

But the Vice-Chancellor referred it back to the Master, to review his Report; and ordered that the Warden of the Fleet should produce the Defendant, before the Master, at such time and place as the Master should appoint, and that the Inquiry should be proceeded with, in the Defendant's presence.

1831.—Mackinnon v. Sewell.

['78]

*MACKINNON v. SEWELL.

1831 : 16th December. *Will.—Construction.*

Testatrix bequeathed her Residue, in Trust for her Daughter *Caroline* for life, and after her death, for her Granddaughter if she should survive her Mother, and attain 21, but in case she should not survive her Mother, and attain 21, then in Trust for such other Child or Children of the Testatrix's said Daughter, as should be living at their Mother's death, to be paid to them after her death as they attained 21, and if all such other Children of the Testatrix's said Daughter, should die before attaining 21, then in Trust for *L. M.* The Grand-daughter attained 21, but did not survive her Mother. Another Child of the Testatrix's Daughter attained 21, but did not survive his Mother; afterwards the Daughter died. Held, that the Bequest over to *L. M.* took effect.

LYDIA VERNON, by her Will, dated the 11th of July 1782, disposed of her Residuary Personal Estate in the following words: "And, as to the rest, residue and remainder of all my Personal Estate and Effects whatsoever, and wheresoever I give, devise and bequeath the same unto Lord *Hawke* and *John March*, upon Trust to lay out and invest the same in or upon such of the Public Funds, Stocks or Government or Real Securities, as they shall think proper, the same to be taken in their joint Names, and to be had and held by them, and the survivor of them, his Executors and Administrators, upon Trust to receive, answer and pay the Dividends, Interest and Income thereof, from time to time, as the same shall become due and payable, unto my Daughter *Caroline Dewar*, for and during the term of her natural life, for her sole and separate use and benefit, and not to be subject to the Control, Debts or Engagements of her present or any future Husbands and Husband, and her Receipts, from time to time, shall be the only sufficient discharges for the same notwithstanding her Coverture, and, from and after her decease, upon Trust, to assign, transfer and pay the Principal thereof, with the Divi-

['79] dends and Interest then grown, unto my Grand-daughter, *Caroline Lydia Dewar*, if she shall survive her said Mother and live to attain the age of 21 years, and, in the mean time, after her said Mother's decease, to pay and apply the Dividends, Interest and Income thereof, for or towards her Maintenance and Education; and, in case the said *Caroline Lydia Dewar* shall not survive her said Mother and live to attain the age of 21 years, then upon Trust to assign, transfer and pay, all the said Trust Stocks and Premises, to such other Child or Children of my said Daughter *Caroline Dewar*, in such manner as she shall, by any Writing under her hand, notwithstanding her Coverture, nominate, direct or appoint; and, for want of such nomination, direction or appointment, then in Trust to assign, transfer and pay, all the said Trust Stocks, Securities and Premises, to such other Child or Children of my said Daughter, *Caroline Dewar*, as shall be

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living at the time of her decease, equally to be divided between them, share and share alike, if more than one, and, if but one, then the whole to such only Child, and to be paid them respectively after their said Mother's decease, when and as they respectively shall have attained the age of 21 years, and, in the meantime after their said Mother's decease, the income of their respective portions to be paid or applied for or towards their Maintenance and Education respectively: and, in case of the death of any of them before such age, then the Share, or Shares of such Child or Children so dying, shall go and be paid to the survivors or survivor of them, at such time as his, her or their original Share, or Shares, is or are made payable as aforesaid: and, if all such other Children of my said Daughter, *Caroline Dewar*, shall happen to die before attainment of the said age of 21 years, then in Trust for, and I give the same to my Daughter, *Louisa Mackinnon*, her Executors, Administrators and Assigns." [*80] And the Testatrix appointed Lord *Hawke* and *John March* Executors of her Will.

The Testatrix died in August 1789. After payment of her Funeral and Testamentary Expenses, Debts and Legacies, there was left standing in her Name 5,600*l.* Three per Cent. Reduced Annuities, the Dividends whereof were paid by Lord *Hawke*, the surviving Executor, to the Testatrix's Daughter, *Caroline Dewar*, during her life. *Caroline Lydia Dewar* did not survive her Mother, *Caroline Dewar*, but died in April 1800. In April 1804, *Caroline Dewar*, in exercise of the Power given to her by the Will, appointed 1,000*l.* part of the 5,600*l.* Stock, to her Son *John Dewar*. In December 1812, *John Dewar* died, having previously attained the age of 21 years. *Maria Dewar*, his Widow, took out Letters of Administration to his Effects. In April 1821, *Caroline Dewar* died. She had no other Children than *John Dewar*, and *Caroline Lydia Dewar*. In June 1824, *Maria Dewar* died, leaving the Defendants *Caroline Dewar* and *Henry Dewar*, her only Children by *John Dewar*. The Testatrix's Next of Kin at her death, were her three Daughters, *Louisa Mackinnon*, *Caroline Dewar*, and *Elizabeth Dupont*. *Louisa Mackinnon* died a Widow in 1816, and the Plaintiff *Daniel Mackinnon*, the Elder, took out Administration to her Effects. The Defendants *Caroline Dewar*, and *Henry Dewar*, as the only Children of *John Dewar*, the surviving Child of *Caroline Dewar* deceased, were entitled to the grant of Administration of the Effects of *Caroline Dewar* deceased, but had not obtained it. In April 1822, Mrs. *Dupont*, in [*81] consideration of natural Love and Affection, assigned, to the Defendant *Daniel Mackinnon*, the younger, (who was her Great-nephew) all the distributive and other Parts and Shares, Sums of Money, Estate and Effects which she then was or might become entitled unto under the Will, or as one of the Next of Kin, of *Lydia Vernon*. Mrs. *Dupont* died, without Issue, in 1824.

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The Bill, which was filed by *Daniel Mackinnon*, the elder, as the Personal Representative of *Louisa Mackinnon*, against *Sewell* and *Holmes*, the Representatives of Lord *Hawke*, *Daniel Mackinnon*, the younger, and *Henry Dewar* and *Caroline Dewar*, prayed that the true Construction of the Trusts contained in the Will of *Lydia Vernon*, as to her Residuary Personal Estate, might be declared, and that the rights and interests of the Plaintiff, and of *Daniel Mackinnon* the younger, *Caroline Dewar* and *Henry Dewar* (if any) to and in the clear Residuary Personal Estate of *Lydia Vernon*, might be ascertained and declared, and that *Sewell* and *Holmes* might be decreed to transfer the Residuary Personal Estate of *Lydia Vernon*, remaining unappointed by *Caroline Dewar*, to the Plaintiff, or as the Court should direct.

The facts above stated were found, by the Master, in pursuance of the Decree made on the hearing of the Cause, by which he was directed to inquire whether *Caroline Lydia Dewar* survived her Mother *Caroline Dewar*, and when they died respectively, and whether *Caroline Dewar* ever and when, and to what extent, and in whose favour executed the Power of Appointment given to her by the Testatrix's Will, and whether *Caroline Dewar* [*82] had any and what Children or Child besides *Caroline Lydia Dewar*, and whether such other Children or Child were or was living or dead, and, if dead, when they, he or she died; and whether they, he or she, lived to attain the age of 21 years, and who were the Next of Kin of the Testatrix living at her death, and whether any of them were dead, and who were their Personal Representatives.

The Cause now came on to be heard for Further Directions.

Mr. Knight and Mr. Beames for the Plaintiff:

It is a settled rule of construction, that, where a Testator has made a Bequest, which may fail in more than one event, and has made a Limitation over of the Property bequeathed, in words which do not take in all the events in which the prior Gift may fail, those words include every case of failure. *Jones v. Westcomb* (a). *Murray v. Jones* (b). The intention of the Testatrix, in this Case, was that, if at the death of *Caroline Dewar* none of that Lady's Children could take her Residuary Estate, it should go to *Louisa Mackinnon*, or, in other words, that, on the failing of the prior Limitation, and not on its failing in a particular mode, the Limitation over should take effect. The consequence is that, as neither of *Caroline Dewar's* Children survived her, *Louisa Mackinnon* is entitled to the Residue. If any other Construction is put on the Language of the Residuary Bequest, the Residue will be undisposed of: but the Court never puts such a Construc-

(a) 1 Eq. Ab. 245. pl. 10.

(b) 2 Ves. & B. 313.

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tion on the Language of a Will, as will create an Intestacy, except where the words will not admit of any other construction.

*Sir. *E Sugden* and Mr. *Barber*, for the Defendant *Daniel* [*83] *Mackinnon* the younger :

The Cases cited are totally different from this Case. In *Jones v. Westcomb*, the Testator bequeathed a Term for years to his Wife for life, and, after her death to the Child she was then *enceinte* with, and if the Child died before 21, than he gave, One-third of the Term, to his Wife, and the other Two-thirds to other Persons. It happened that the Wife was not *enceinte* at all ; so that the object, on the failure of which the Gift over was to take effect, was removed more than in the manner contemplated by the Testator. The Language of the Bequest over, more than included the event that happened. This Case is the reverse of *Jones v. Westcomb*. It was in a given event only that the Testator intended *Louisa Mackinnon* to take. Can it be fairly collected, from any part of this Will, that the Testatrix meant, what she certainly has not expressed, namely, that if nobody could take under the previous Gift, then the subsequent Limitation should take effect ? It has never been held, in any Case, that, because there was no Person capable of taking the Property bequeathed, it should go to a Person who was to take it under circumstances totally different from those that happened. If the construction which the Plaintiff contends for, is put upon this Residuary Bequest, the Court will, in effect, strike out some of the words in which it is expressed, and introduce others ; and the consequence will be that *Louisa Mackinnon* will take the Fund on the happening of an event on which it is not given to her, and the Children of *John Dewar* will be excluded from participating in it. The Residue is given, to *Louisa Mackinnon*, in case all the Children of *Caroline Dewar* die before the attainment of 21 : but *John Dewar*, as well as *Caroline Lydia Dewar*, attained 21 ; [*84] how then can *Louisa Mackinnon* be entitled to the Fund ?

Mr. *Knight*, in reply :

The Testatrix's intention was that, if the previous Bequest failed in either of the modes pointed out, then *Louisa Mackinnon* should take the Residue. It could make no difference, to the Testatrix, whether the prior Gift failed in one mode or the other. If there had been one surviving Child of *Caroline Dewar*, that Child would have taken the Residue, to the exclusion of the Issue of the other Children. If *Caroline Lydia Dewar* had died under 21, leaving Issue, they would not have taken ; and, if all the Children of *Caroline Dewar* had died under 21 leaving Issue, Mrs. *Mackinnon* would have taken the Residue, and the Issue would have been excluded. The prior Bequest having failed, the substituted Bequest to *Louisa Mackinnon*, has taken effect.

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Mr. *Swanston* and Mr. *Ching* appeared for the Defendants *Henry Dewar* and *Caroline Dewar*.

The VICE-CHANCELLOR:

Upon merely reading the Clause by which the Testatrix disposes of her Residuary Estate, it is, I think, impossible to doubt what the Testatrix meant; because, in the first instance, she gives, to her Daughter, a Life Interest in the Securities in which the Residue is to be invested; and then, on the death of her Daughter she directs the Trustees to transfer the Securities to her Grand-daughter, *Caroline Lydia Dewar*, if she shall survive her Mother, and live to attain the age of 21 years. So that the Donee is to answer

the description both of surviving the Mother and attaining 21; [*85] and *then, in case *Caroline Lydia Dewar* shall not survive her Mother, and live to attain the age of 21 years, a different disposition is made of the Fund. That disposition is made, in the first instance, in terms which, through the medium of an Appointment by the Mother, might have had the effect of giving the property to any of her other Children, generally, leaving the Mother to exercise her own discretion, as to whether her other Children should or not take absolutely in her lifetime, even although they were minors. But, if the Power of Appointment be not exercised, then the Trustees are to assign the Residuary Fund: "to such other Child or Children of my said Daughter *Caroline Dewar* as shall be living at the time of her decease, equally, to be divided between them, share and share alike, if more than one, and, if but one, then the whole to such only Child, and to be paid to them, respectively, after their said Mother's decease, when and as they respectively, shall have attained the age of 21 years, and, in the meantime, after their said Mother's decease, the Income of their respective Portions to be paid or applied for or towards their Maintenance and Education respectively; and, if all such other Children of my said Daughter *Caroline Dewar*, shall happen to die before attainment of the said age of 21 years, then in Trust for, and I give the same to my Daughter *Louisa Mackinnon*." The question is whether the Testatrix did not mean to make a Bequest over in case none of the other Children of her Daughter *Caroline Dewar*, survived their Mother and attained 21. In my opinion it is clear that she meant her Residuary Estate to go over, in the event of that contingency happening. Then the question is whether I am not at liberty so to

construe those words, which do not artificially express that condition, as the Court *construed the words in *Jones v. Westcomb*, and [*86] *Murray v. Jones*. And I certainly think that I am not doing more violence to the expressions used by the Testatrix in this Case, if I construe them so as to make *Louisa Mackinnon* take in the event that has happened, than was done to the language of *Lady Bath's Will*, in the case of *Murray*

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v. Jones. The exact words used in the Bequest in *Jones v. Westcomb*, are not stated, in the Report; but, taking their effect to be as it is there represented, the Party, contemplating that there might be a Child born, makes a Gift over, in the event of the Child dying under the age of 21. The expression: "if the Child shall die under 21," is equivalent to the expression: "if the Child shall not live to attain 21." It points to the same event, although the words are not the same; and I cannot but think that the Bequest over in this Case, in the event of the Children that may survive the Mother not attaining the age of 21, is but equivalent to a Bequest over in the event of there being no Child who shall survive the Mother and attain 21; and although, by putting that construction on the Gift over, violence is done, to a certain extent, to the words of the Will, yet more violence is not done to them than has been done in similar Cases: and I have to add that the intention of the Testatrix, as it is to be collected from the context of the Will, appears to require that the Language of the Bequest over should receive the construction which I have put upon it: and I, therefore, think that *Louisa Mackinnon* is entitled to the Residuary Fund.

All Parties must have their Costs out of that Fund.

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[*87]

1831: 17th December. 1832: 10th January. *Inclosure Act.—Vendor and Purchaser.—Title.*

The General Inclosure Act, so far as it enacts that the Commissioner's Oath, and the appointment of any new Commissioner, shall be annexed to and enrolled with the Award, is merely directory.

An Inclosure Act directed Allotments to be made to *A.* as a full Compensation for his right to the Soil of the Waste as Lord of the Manor, for his right to the Tithes as Rector, and for his right of Common. Part of the Waste had been used by the Lord as a Rabbit-warren, but no mention of it, as such, was made in the Inclosure Act, nor did it appear that the Lord had any right of Warren in the Waste. The Commissioners made an Allotment to *A.* as a full Compensation for his Right and Interest in the Warren, and also three other Allotments as a full Compensation for his Rights abovementioned: Held that *A.*'s Title to the Allotment in respect of the Warren could not be objected to, as that Allotment was a portion of the Lord's Compensation for his right of Soil.

THE Estates of the late *William Strode*, Esq., situate at *Northaw* in the County of *Hertford*, having been sold under the Decree in this Cause, and *W. W. Drake*, Esq., who had purchased certain parts of those Estates, having objected to the Title, it was referred to the *Master* to inquire and state whether a good Title could be made to the purchased Premises. The *Master* reported in favour of the Title; upon which the Purchaser took an exception to the Report, on the following, amongst other grounds.

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"First: Because it is alleged that the Title to part of the said Premises, is derived under an Award made by the Commissioners under an Act of Parliament passed in the 43d of Geo. 3, for dividing, allotting and inclosing, and otherwise improving the Waste Land within the said Parish of *Northaw* in the County of *Hertford*, and it has not been shown that the Persons by whom such Award was made, had qualified themselves to carry the

[*88] said Act of Parliament into execution, nor that Mr. *John Taylor*, one of such Persons, had been duly appointed a Commissioner for the purposes of the said Act, or had power to make such Award.

"Second: Because it is alleged that the Premises in question, are part of the Allotments made, by the said Award, to Mr. *Strode*, in respect of his right to Tithes and to the Warren.

"Third: Because no Title has been shown to the Warren in respect of which such Allotment was made, and that no Evidence has been given to prove that the Warren was Tithe-free."

By the 41 Geo. 3, c. 109, s. 1, (the General Inclosure Act), it was enacted: "That no Person shall be capable of acting as a Commissioner in the execution of any of the Powers to be given by any Act hereafter to be passed for dividing, allotting or inclosing any Lands or Grounds, except the power of signing and giving Notice of the first Meeting of the Commissioner or Commissioners for executing any such Act, and of administering the Oath or Affirmation hereinafter directed, *until he shall have taken and subscribed the Oath or Affirmation following: 'I, A. B., do swear, &c.'*; which Oath or Affirmation it shall be lawful for any one of the Commissioners, where more than one shall be appointed by any such Act, or any one Justice of the Peace for the County within which the said Lands or Grounds shall be situated, where only one Commissioner shall be so appointed, to administer, and they are hereby respectively required to administer the same; *and the said Oath or Affirmation so to be taken and subscribed by each Commissioner*

[*89] *er, and also the appointment of every new Commissioner, shall be annexed to and enrolled with the Award of any Commissioner or Commissioners, and a Copy of the Enrolment thereof shall be admitted as legal Evidence."*

By the *Northaw* Inclosure Act, passed in 43 Geo. 3, after reciting that there was, within the Parish of *Northaw*, a tract of Waste Land and Common, containing about 2,150 Acres, and that *William Strode, Esq.* was Lord of the Manor of *Northaw, Nyn and Cuffley* in the Parish of *Northaw*, and that he, as Lord of the Manor, was seised of or entitled to the Soil and Royalties within the same, and, as Lay Rector of the Parish, was entitled to all Tithes, both Great and Small, arising within the same, and claimed right of Common, in respect of the said Soil and Royalties, on the said Waste

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Land and Common; and that there were, within the Manor and Parish, several Messuages, Tenements, Tofts, Homesteads and old inclosed Lands, the Proprietors of which claimed to be entitled to a right of Common upon the said tract of Waste Land and Common: It was (amongst other things) enacted that all the said tract of Waste Land and Common, should be divided, set out and allotted, as soon as might be after the passing of that Act, by *Abraham Purshouse Driver*, *William Young* the elder, *William Young*, his Son, and *John Bockett* (who were thereby appointed Commissioners for carrying the Act into execution), in such manner and subject to such Regulations as were thereafter contained, with such of the Powers, and subject to such of the Rules, Orders, Directions and Regulations contained in an Act passed in the 41st Geo. 3, (the General Inclosure Act,) as were not controlled by, or repugnant to any of the Clauses, Provisions or Regulations contained in the now stating Act: And it was further en- [*90] acted that, if the said *Abraham Purshouse Driver*, or any Person who should be appointed a Commissioner in his place, in manner thereafter mentioned, or, if the said *William Young*, the elder, or any Commissioner to be appointed in his stead, and in the stead of his said Son (whose power in that case should cease and determine) should die, refuse to act, or be incapable of acting as a Commissioner for the purposes of the Act, it should be lawful for the Lord of the Manor for the time being, at the time and in the manner therein mentioned, to appoint a fit Person to be a Commissioner in the place of each of them so dying or refusing or becoming incapable of acting as aforesaid, and, in case the said *John Bockett*, or any Person who should be appointed a Commissioner in his place, in manner thereafter mentioned, *should die*, refuse to act, or be incapable of acting as a Commissioner in execution of that Act, a new Commissioner should be appointed, from time to time, in the stead of him so dying, refusing or being incapable as last aforesaid, by the major part in value (the Lord of the Manor for the time being excepted) of the several Proprietors entitled to a right of Common upon the said Waste Land and Common, who should, as occasion might require, be assembled at a public Meeting to be held for that purpose within one calendar month next after any such death, refusal or incapacity as last aforesaid should happen, or as soon afterwards as conveniently might be, of which Meeting 14 days notice should be given, affixed on the Church-door of *Northaw* aforesaid, and by Advertisement in some one or more of the Newspapers printed at or in the neighbourhood of *London* and *Westminster*; and the majority in value of the Proprietors so assembled, were thereby required, *by some Instrument under their Hands*, to appoint [*91] some such fit and proper Person to be a Commissioner in the place and stead of the said *John Bockett*, or any succeeding Commissioner to be

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appointed in his place: And it was further enacted that the Commissioners should (after deducting such parts of the Waste Land and Common as they might think proper to set out for the public Highways, Roads and Drains) set out and award, to Mr. *Strode*, his Heirs and Assigns, as a compensation for the Soil of the Waste Land and Common, as Lord of the said Manor, one full 18th Part (quantity and quality considered) of all the Residue of the Waste Land and Common, over and above, and exclusive of such Share and Allotment of the said Waste Land and Common, or the Residue thereof, as was thereafter directed to be allotted, to him, in lieu of his right of Common therein; and also should award to *Strode*, his Heirs and Assigns, as a compensation for the Improprate Tithes due and payable to him as aforesaid, one Eighth part of the Residue of the Waste Land and Common, over and above and exclusive of such Share or Allotment as last aforesaid, in exoneration of all the Waste Land and Common then intended to be inclosed, from all Tithes, both Great and Small, for ever thereafter; and, after making such deductions as aforesaid, and after such parts of the whole Residue of the Waste Land and Common should have been set out and allotted to *Strode* in manner aforesaid, the Commissioners were thereby required to divide all the Residue of the Waste Land and Common, amongst the said *William Strode* and the several other Persons having any right of Common upon such Waste Land and Common, in proportion to their respective Claims: And it was further enacted that, after the general Award of the Com-

[*92] missioners should be enrolled *as directed by the General Inclosure Act, the same should be deposited in the Parish Church of *Northaw*: Provided that nothing therein contained, should prejudice *Strode's* right or title as Lord of the Manor, to the Seignory and Royalties belonging to the Manor, but that he, his Heirs and Assigns, should hold and enjoy all Courts, Perquisites and Profits of Courts, Rents, Waifs, Estrays, Mines, Minerals and Quarries, and all Royalties, Jurisdictions, Matters and Things to the Manor belonging or appertaining, in as ample a manner, as he or they might have done, if that Act had not been made.

By the Award dated the 29th of August 1806, and executed by *A. P. Driver, W. Young*, the elder, *W. Young*, his Son, and *John Taylor* (who was described as the Commissioner appointed, in pursuance of the Power contained in the *Northaw* Inclosure Act, in the room of *John Bockett*, deceased) and by *Wm. Strode*, as Lord of the Manor and Lay Rector of the Parish, and by that gentleman and the several other Persons, Owners and Proprietors of Land and Common Rights in the Parish, whose names were thereunto subscribed; after reciting the last-mentioned Act, and that *Abraham Parsonhouse Driver, Wm. Young* the elder, and *Wm. Young* his Son, in order to render themselves capable of acting as Commissioners in the Execution of the

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Act, had taken and subscribed, at the times therein mentioned, and before they began to act, the Oath prescribed by the General Inclosure Act; and that *John Taylor*, was at a Meeting held, on the 31st of July 1804, in pursuance of the Power contained in the *Northaw* Inclosure Act, appointed, by the major part of the Proprietors then present, a Commissioner in the room of the said **John Bockett* deceased, and that *Taylor*, being so appointed, did, on the same day, and before he began to act, take and subscribe the same Oath: The Commissioners awarded to Mr. *Strode* and his Heirs, a piece of Freehold Land containing 102 acres, entirely surrounding the Warrener's House and Garden, called *Northaw Wells* and the Medicinal Spring, which they declared was, in their judgment, a full Compensation for *Strode's Right, Title and Interest in the said Warren*: and they awarded to him, as Lord of the Manor, a piece of Land containing 81 A. 3 R. 28 P., as a full Compensation for his Right and Interest to the Soil of the Common and Waste Ground: and they awarded to him, as Lay Rector of the Parish of *Northaw*, other pieces of Land, as a full Compensation for all his Improprate Tithes arising upon the Lands in the Parish, directed to be inclosed: and they awarded to him, as a just compensation for his Rights of Common and other Rights and Interests, certain other pieces of Land, which Allotments they declared were, in their judgment, a full Compensation for all his Right and Interest in all the Lands directed to be inclosed.

Sir *E. Sugden* and Mr. *Teed*, for the Purchaser, in support of the first Objection, said that there was no Evidence that *Taylor* had been properly appointed a Commissioner in the place of *Bockett*; for that, by the *Northaw* Inclosure Act, it was required that the Commissioner to be appointed in the place of *Bockett*, should be appointed at a Meeting of the Proprietors, held within one calendar month after his death, of which Notice was to be given in the manner prescribed by the Act, and that the Appointment was to be in writing, and signed by the majority in value of the Proprietors present; and that, the General Inclosure Act required that the Instrument by which the Appointment was made, should be annexed to and enrolled with the Award; but that it did not appear that the appointment of *Bockett* had been made in the manner and form required by the Local Act, nor was the Appointment annexed to the Award, nor was there any Evidence that it had ever existed; that, if a new Trustee were to join with one of the original Trustees of a Settlement (which was mere private Instrument) in exercising a Power, a Purchaser would have a right to call for Evidence to show that the new Trustee had been duly appointed; and, further, that the General Inclosure Act enacted that the Commissioners, before they began to act, should take and subscribe a certain Oath, and that the Oath so

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taken and subscribed, should be annexed to and enrolled with the Award, and that a Copy of the Enrollment should be admitted as legal Evidence ; but no such Oath was annexed to or enrolled with the Award, nor was there any Evidence that any of the Commissioners had taken and subscribed the Oath ; and, if there had been any such Evidence, it would not be admissible, as the General Inclosure Act prescribed the mode in which the qualification of the Commissioners should be proved, and that, therefore, it could not be proved in any other manner : that the Award, when enrolled, was a Record, and it could not be presumed that the Oath and Appointment had been annexed to the Award, because, on production of the Record, it would appear that they had not been annexed to it ; that, at all events, a Purchaser ought not to be compelled to complete his purchase, without having the proper and regular evidence of his Title.

[*95] *Mr. *Knight*, Mr. *Hodgson* and Mr. *Hovenden*, in support of the *Master's* Report, said that they admitted that neither the Instrument by which *Bockett* had been appointed a Commissioner, nor the Oath which had been taken by the Commissioners, appeared to be annexed to the Award ; but that such annexation was not necessary to give validity to the Award, because the General Inclosure Act, so far as it related to such annexation, was directory only : that the Award was executed so long ago as the year 1806 ; and that it appeared, by the Recitals in it, that the Commissioners, who were Public Officers acting in the execution of their duty, had taken and subscribed the Oath, and that *Taylor* had been duly appointed a Commissioner : that the omitting to comply with the requisites of the Act, was an indictable offence : that the Award was kept in the Parish Chest, and was open to the Inspection of all the Parishioners ; and that it must be presumed (there being no Evidence to the contrary) that the formalities required had been duly observed, the rule being *omnia præsumuntur rite esse acta donec probetur in contrarium*. *Williams v. The East India Company* (a) : that Mr. *Schneider*, who had purchased other parts of Mr. *Strode's* Estates, had objected to the Title, on the same Grounds as the present Purchaser had done, and that Sir *T. Plumer*, M. R., and afterwards Lord *Elton*, C., on Appeal, over-ruled the Exception (b).

Sir *E. Sugden* and Mr. *Teed*, in support of the second and third
[*96] Objections to the Report, said that the Local *Act enacted that Allotments should be made, to Mr. *Strode*, as a Compensation for the Soil of the Lands directed to be inclosed, for the Tithes of the same Lands, and for his Rights of Common, and that it reserved to him, all Royalties,

(a) 3 East, 192.

(b) It does not appear from the Reports of this Exception in 2 Swanst. 347, and Jacob's Reports, 630, that Mr. *Schneider's* Objections were similar to those in the present Case.

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&c.; that the Commissioners had made Allotments to *Strode*, as a Compensation for such Rights, and, so far, they had done rightly; but that, in addition to those Allotments, they had awarded to him a piece of Land, containing 102 acres, as a Compensation for his Right to the Warren: that the Local Act said nothing at all about the Warren: that there was indeed a piece of Land in the Parish, which *Strode* had stocked with Rabbits, but it was open, and formed part of the Common, and, consequently, that Mr. *Strode's* Right in it, was satisfied either by the first, or by the third Allotment: that the Lord of a Manor was not justified in keeping Rabbits on a Common, as they injured the Pasturage: that, if the Warren was an incorporeal Hereditament, no mention was made of it, in the Act, and, being a Franchise, it was reserved to Mr. *Strode*, by the reservation in the Act: that, if the Land which was used as a Rabbit-warren was *Strode's* own exclusive Property, it was not divisible under the Act, and the Commissioners had no power to make any Allotment to him in respect of it; that the Lands purchased by Mr. *Drake*, were sold to him Tithe-free, and, as the Allotment in respect of the Warren, consisted of the same Land as was used as a Warren, that part of the purchased Property was subject to Tithes, for it was the Waste Land and Common only which the Act exempted from Tithes.

Mr. *Knight*, Mr. *Hodgson* and Mr. *Hovenden* argued in support of the Report against the second and third *Objections. In the [*97] course of their Argument, the Case of *Cooper v. Thorpe* (c) was cited, upon which the *Vice-Chancellor* observed that the Plaintiff, the Rector, in that Case, appealed to Lord *Eldon* from Sir *T. Plumer's* Judgment, and that his Lordship directed an Action to be brought by the Rector; and that the Jury found a Verdict for the Defendants, the Occupiers; but that a new Trial was granted, and, on the second Trial, a Verdict was found for the Plaintiff, and Lord *Eldon* ultimately decreed in his favour (d).

The VICE-CHANCELLOR:

This Case of *Casamajor v. Strode* came before me on an Exception taken, by Mr. *Drake*, the Purchaser of certain parts of the Estates of the late *Wm. Strode*, Esq., to the Report of the *Master*, who had certified that a good Title could be made to those parts of the Estates. The first Objection to the Report, was that it had not been shown that the Persons, by whom the Award under the *Northaw* Inclosure Act, was made, had qualified themselves to carry that Act into execution, or that Mr. *John Taylor*, one of such Persons, had been duly appointed a Commissioner for the purposes of the Act, or had Power to make the Award. That objection was founded upon a Regulation which was contained, not in the Local Act, but in the

(c) 1 Swanst. 90.

(d) See 4 Barn. & Cress. 30, and 2 Russ. 78.

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General Inclosure Act. That Act directs that no Person shall be capable of acting as a Commissioner in the execution of any Inclosure Act thereafter to be passed, until he shall have taken and subscribed the Oath or Affirmation therein specified; and it then directs that the Oath or Affirmation so [*98] to be taken and subscribed, *and also the Appointment of any new Commissioner, shall be annexed to and enrolled with the Award, and that a Copy of the Enrolment shall be admitted as legal Evidence. In this Case the Oath of the Commissioners and the Appointment of the new Commissioner, do not appear to have been annexed to and enrolled with the Award, and, therefore, it is considered that the Award is void altogether.

It is observable that the Award recites that the Parties who were appointed Commissioners, had taken the Oath prescribed. The objection rests itself on this, that those proceedings which are recited in the Award, have not been annexed to, and enrolled with it. Now the General Inclosure Act does not say that, in case there shall not be the annexation and enrolment, therefore the Award shall be void; but it merely directs certain acts to be done, and that a certain matter pointed out by the Act of Parliament, shall be evidence that those acts were duly performed: but it does not say that no other evidence of the acts having been duly done, shall be receivable. I think therefore that the General Inclosure Act is, in this part of it, merely directory, and that it is not to be considered as making void all the acts done by the Commissioners under an Inclosure Act, because the Oath taken and subscribed by them and the appointment of any new Commissioner, do not appear to be annexed to, and enrolled with the Award. By the recitals of the Award in this Case, every thing appears to have been rightly done; and my opinion is that, if those recitals had not been contained in the Award, a Court of Law would have been bound to presume, in the absence of any Evidence to the contrary, that the acts required to be done had been [*99] rightly *and duly performed. I am of opinion, therefore, that the first ground on which the Exception is attempted to be supported, totally fails.

I must observe, further, that this objection regarding the appointment of *Taylor*, was one of the grounds on which Mr. *Schneider* founded his Exception to the same Title. I was one of the Counsel in the Case; and the impression on my mind is that, if any argument was addressed to the Court in support of the objection, it was an argument which did not satisfy the mind of Lord *Eldon*, or that the Counsel in support of the Exception, did not think that the point was worth arguing.

The second objection is: "Because it is alleged that the Premises in question, are part of the Allotments made, by the Award, to Mr. *Strode*, in respect of his right to Tithes and to the Warren:" and that objection was

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united, in the Argument, with the third objection, which is: "Because no Title has been shown to the Warren, in respect of which such Allotment was made, and that no Evidence has been given to prove that the Warren was Tithe-free." In support of those objections it was argued that the Commissioners had so constructed their Award as to show that they had done something which, by the Inclosure Act, they were not authorized to do: because it directed them to make Allotments to Mr. *Strode*, as a compensation for the Soil of the Waste Land and Common, for the Tithes of the same Lands, and for his right of Common therein. Now, what the Commissioners have done by their Award is this; they have, first of all, allotted, to Mr.

Strode, for his Interest in the Warren, a certain portion of *the [*100.] Waste Land, containing 102 Acres, entirely surrounding the Warrener's House and Garden, called *Northaw Wells*, which Allotment they declare is, in their judgment, a full compensation and satisfaction, to Mr. *Strode*, for all his Right, Title and Interest in the said Warren. I do not however observe that the Warren is any where mentioned before. It was said that the Commissioners had no power to allot the 102 Acres in question (which, as I collected from the Arguments at the Bar, form the identical Tract of Land called the Warren), in lieu of Mr. *Strode's* Interest in the Warren. It is not denied that the Commissioners were to allot, first of all, to Mr. *Strode*, what, in their judgment (not exceeding a certain proportion) should be a compensation for his right of Soil as Lord of the Manor; and it is quite idle to say that the Commissioners might have allotted, to Mr. *Strode*, in lieu of his right of Soil as Lord of the Manor, the 81 A. 3 R. 38 P., and the 102 Acres which formed the Warren, collectively, but that they had no power to allot to him, separately, the 102 Acres in respect of his right of Soil in that part of the Waste which was called the Warren, and the 81 A. 3 R. 38 P., in respect of his right of Soil in the other parts of the Waste. It is manifest that the Commissioners, in making their Award, have merely divided into two parts, that which they might have comprised in one, undivided and complete Allotment. My opinion therefore is that they have not exceeded the Powers conferred on them by the Act of Parliament, but that they were authorized to do what they have done.

This Case bears no resemblance, whatever, to *Cooper v. Thorpe*, where the objection to the Award was that *the Commissioners [*101] had not done that which the Act required them to do, inasmuch as they had not made any Allotment to the Rector, expressly, in lieu of the Tithes of *Waddingham*, and, therefore, notwithstanding the declaration of the Act of Parliament in that Case, that, after the Award, all the Tithes should cease, the Rector's right to the Tithes of *Waddingham* remained.

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For the reasons which I have stated, I think that the second and third objections are not sustainable.

* Mr. Drake, appealed, to the Lord Chancellor, from this Decision. On the 15th April 1833, his Lordship affirmed the Judgment, as to the first objection; but said that the second and third objections should be re-argued before him in the presence of two of the Judges of the Court of Common Pleas. Those objections were accordingly re-argued before the Lord Chancellor, Lord Chief Justice Tindal and Mr. Justice Bosanquet: and those two learned Judges agreeing in opinion with the Lord Chancellor, that the second and third objections were valid, his Lordship, in Feb. 1834, reversed the Judgment of the Vice-Chancellor as to those objections.

[*102]

*PHILLIPS v. EVERARD.

1831: 21st December. *Specific Performance.—Executors.*

A. leased Premises to B. for 10 years; and B. covenanted *not to assign* the Premises, without A.'s consent. A. agreed to grant to C. a Lease for 10 years, from the end of B.'s term, subject to the same Covenants as were contained in B.'s Lease. C. died, before the Lease was executed to him. A. filed a Bill against C.'s Executors (who admitted Assets), for a Specific Performance of the Agreement, and offered so to qualify the Covenants of the Lease, as that the Executors should be no further liable thereon, than they would have been on the Covenants which ought to have been entered into by the Testator, in case a proper Lease had been made to him. Specific Performance of the Agreement decreed, with a reference to the Master to settle the Lease.

By an Indenture dated the 19th of April 1819, the Plaintiff demised to Isaac Daulton, his Executors and Administrators, a Dwelling-house with the Out-buildings, Yards and Gardens thereunto belonging and adjoining, situate in Spalding in the County of Lincoln, and also two pieces of Pasture Land, containing five Acres, for 10 years, from the 6th of April 1820, at the yearly Rent of 280*l.*; and it was thereby agreed that it should not be lawful, for Daulton*, to part with the possession of the demised Premises, to any Person, for all or any part of the Term, without the consent of the Plaintiff, his Heirs or Assigns, in writing, for that purpose, first had and obtained. Daulton, by virtue of the Lease, took possession of the Premises, and continued in possession of the same until the year 1825, when he entered into a Treaty, with Richard Everard, to assign to him a certain part of the Premises, for the residue of the Term granted by the Lease. The Bill stated that, on the occasion of such Treaty, Everard offered and agreed to pay, to Daulton, a Rent of 55*l.* per annum, for the Premises to which the Treaty related, provided that Daulton could obtain the Plaintiff's consent [*103] to the Assignment thereof, and provided the Plaintiff would consent to grant, to him, Everard, a further Lease of the same Premises, for seven or ten years at the same Rent of 55*l.* per annum, on the ex-

* This Proviso, as it was set forth in the Bill, did not extend to Daulton's Executors or Administrators. See the Judgment of Ashhurst, J. in *Roe v. Harrison*, 2 T. R. 429.

 1831.—Phillips v. Everard.

piration of the Term granted to *Daulton*. The Plaintiff consented to the proposed Assignment, and, as the Bill stated, agreed to grant, to *Everard* a further Lease, for 10 years, of the Premises proposed to be assigned to him, at the Rent of 55*l.* per annum, and subject to the same Covenants as were contained in *Daulton's Lease*.

In order to show that *Everard* was bound to take the further Lease upon the Terms before mentioned, the Bill set forth several Letters relating thereto, which had been written, by *Charles Bonner*, as the Solicitor, and by the desire (as the Bill alleged) of *Everard* to the Plaintiff, and the Answers returned thereto, and which the Bill contended, amounted to a binding Agreement, between the Plaintiff and *Everard*, for such further Lease.

In July 1825 *Everard* entered into possession of the Premises agreed to be assigned to him, and continued in possession of them until the 20th of November 1829, when he died, having, by his Will, appointed the Defendants his Executors; but he had not taken any Lease from the Plaintiff, in pursuance of the alleged Agreement. After *Everard's* death, the Plaintiff's Solicitor informed the Defendants, by Letter, that the Plaintiff was ready to grant, to them, a Lease agreeably to their Testator's Contract, and to permit the Covenants, which were to be entered into on their parts, to be so qualified as that the Defendants might be no further liable thereon, than they would have been on the Covenants which ought *to have [*104] been entered into by the Testator, in case a proper Lease had been made, to him, in his lifetime, and he had executed a Counterpart thereof. The Defendants, however, declined to accept any Lease from the Plaintiff: upon which the Bill was filed, charging (amongst other things) that the Plaintiff had made the beforementioned offer to the Defendants, and praying that the Defendants might be decreed specifically to perform the Agreement so made and entered into by the Testator, and that they might be decreed to execute the Counterpart of a proper Lease of the Premises, to be executed by the Plaintiff for carrying the Agreement into effect according to the true intent and meaning thereof.

The Defendants, by their Answer, said that they did not believe that the Testator ever proposed or intended to bind himself to take the further Lease mentioned in the Bill, or ever entered into any Agreement, or authorized *Bonner* to enter into any Agreement on his behalf, with the Plaintiff, to take such further Lease, but that the Testator only intended to secure to himself, and only authorized *Bonner* to treat, with the Plaintiff, for securing to him the option of having such further Lease, should he desire the same: they denied all knowledge of the Letters stated to have been written by *Bonner* to the Plaintiff; and added that, if *Bonner* ever wrote any such Letters, he did not write them at the desire or with the approbation of the Testator, or

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under his instructions, but had exceeded any instructions given to him by the Testator: they admitted that they had proved the Will, and had possessed Assets of the Testator more than sufficient to discharge all his Debts,

[*105] Funeral and Testamentary Expenses, and also to pay all future, accruing Rent of the Premises, during the Term of 10 years *from Lady-day 1830 (on which day the original Lease expired), in case the Court should be of opinion that a Lease, for that Term, and at the Rent before mentioned, ought to be accepted by them: they submitted whether the alleged Contract (if any such was ever entered into) could be then specifically performed by the Defendants, so as to place them in the same situation as if the Testator had himself accepted a Lease of the Premises, and expose them to no further or other Liabilities, and whether, under the circumstances, the Plaintiff ought not to be left to enforce the Contract (if any) at Law.

The Plaintiff having entered into Evidence to prove his Case, the Cause now came on to be heard; when two questions were raised; first, whether the Letters constituted a binding Agreement between the Plaintiff and the Testator; second, if they did, whether a specific performance of the Agreement, could be decreed against the Defendants, they being the Executors of the Party with whom the Agreement of the Lease had been entered into.

Sir *E. Sugden* and Mr. *Rolfe*, for the Plaintiff.

Mr. *Knight* and Mr. *Garratt* for the Defendants, as to the second question, said that the original Lease contained a Covenant against Assignment: that the further Lease was to be subject to the same Covenants as the original Lease; but, if the Defendants took the further Lease, they, being Executors, must assign it. *Seers v. Hind* (a): that it was impossible so to frame the Covenants of the further Lease, as not to *bind [*106] the Executors in any other way than they would have been bound, if the Lease had been made to the Testator in the first instance: and that the *Reddendum* would amount to a Covenant for payment of the Rent, and would bind the Defendants, though they should assign the Lease.

Sir *E. Sugden*, in reply, said that *Seers v. Hind* did not decide the question: that in *Deen v. Skeggs* (b) the Court were equally divided upon the point: *Roe v. Galliers* (c), *Doe v. Carter* (d), *Roe v. Harrison* (e), in which last Case, it was expressly decided that the Executors or Administrators of a Lessee, might be restricted, by Covenant, from assigning a Lease.

The *Vice-Chancellor* said that the Agency of *Bonner* was established by

(a) 1 Ves. jun. 294.

(b) Cited in 2 T. R. 134, and 8 T. R. 56. (c) 2 T. R. 133. (d) 8 T. R. 57.

(e) 2 T. R. 425. The Cases as to restraints on Alienation, are collected in 1 Swanst. 481. note, to which add *Wilkinson v. Wilkinson*, Coop. C. C. 259, and 3 Swanst. 51b; *Cooper v. Wyatt*, 5 Madd. 482; *Stephens v. James*, ante, vol. iv. p. 499.

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the Evidence, and that the Letters identified the Premises,* and particularized the Terms upon which the Lease was to have been granted to the Testator, and consequently that they constituted a binding Agreement for the Lease; and that, with respect to the form of the Lease to be granted, by the Plaintiff, to the Defendants, it must be referred, to the *Master*, to settle it.

Declare that the Agreement contained in the several Letters of the Plaintiff, bearing date, &c., and in those of *C. Bonner*, in the Pleadings mentioned, bearing date, *&c., ought to be specifically per- [*107] formed and carried into execution, and decree the same accordingly: and let it be referred, to the *Master* of this Court in rotation, to settle and approve of a proper Lease of the Estate and Premises comprised in the said Agreement, in case the Parties differ about the same; and let the Plaintiff execute the said Lease, and the Defendants *Henry Everard* and *Robert Everard*, the acting Executors of *Richard Everard* deceased, the Testator in the Pleadings named, execute a Counterpart thereof: and let the said *Master* tax the Plaintiff his Costs of this Suit, up to this time; and let the said Defendants, as such Executors, pay, to the Plaintiff, what shall be taxed for such Costs: and any of the Parties are to be at liberty to apply, &c.*

BOLTON v. THE CORPORATION OF LIVERPOOL.

THE Motion made, in this Cause, for the production of Documents in the possession of the Defendants, is reported, *ante*, Vol. III, p. 467. The Judgment of the *Lord Chancellor*, affirming his *Honor's* Order, is reported in 1 Mylne & Keen, 88.

*LEMPRIERE v. VALPY.

[*108]

1832: 13th January & 18th February.—*Power.—Feme Covert.*

A Married Woman having power to dispose of Property, by her Will executed as required by the Power, but not referring to it, gave, to her Husband, all the Property which she might die possessed of, or have in Reversion or in Expectation: Held not to be an Execution of the Power.

By Indentures of Lease and Release, dated the 14th and 15th of Decem-

* No further Proceedings were had in the Cause. The Defendants executed a Lease, not settled by the *Master*, and paid the Costs of the Suit.

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ber 1813, being the Settlement made in contemplation of the Marriage between the Rev. *John Lempriere* with *Elizabeth Deane*, after reciting that *Elizabeth Deane* was entitled to one Fourth, or some other Share of 1,200*l.* Five per Cent. Bank Annuities, and 600*l.* Bank Stock, and the several Bonuses thereon, expectant, respectively, upon the decease of *Sarah Anne Deane*, the Mother of *Elizabeth Deane*, and to the Moiety of 1,000*l.* Three per Cent. Reduced Bank Annuities, expectant upon the decease of *John Deane* her Father, and also to the Remainder or Reversion in Fee of one Fourth part of a Messuage and Lands in *Reading*, to take effect, in Possession, on the respective deceases of the Persons therein named, and that she was also entitled, for her life, to the Dividends arising from 2,627*l.* 5*s.* 2*d.* Four per Cent Consolidated Bank Annuities, standing in the Names of the Trustees therein named, and that she was also possessed of the Sum of 500*l.*, secured, and then due to her, by the joint Promissory Note of her Father and Mother, and that *Elizabeth Deane*, under the Wills of *Sarah Spicer*, *Sarah Zenzau*, and *George Deane* her Grandfather, and the Marriage Settlement of her Father and Mother, was entitled to, or interested in contingent or other Property, consisting of Freehold Estates in the Parishes of *Shinfield* and *Burghfield* and in *Reading* or elsewhere, and divers Sums of Money, Stocks, Funds, and other Personalty, and that it had been agreed that the Freehold Hereditaments and also the 500*l.* Promissory

[*109] Note, and the Principal and Interest thereby secured and the aforesaid Monies, Stocks, Funds and Securities, belonging to the said *Elizabeth Deane*, and her Right, Title and Interest therein, as well vested as contingent, and all other her Personal Estate and Effects, should be conveyed and settled to the Uses, and upon the Trusts thereafter limited, and that, in consideration of such Marriage, and by way of further Provision, the said *J. Lempriere* had agreed to settle and secure, a net Sum of 200*l.* a year, for the Life or Widowhood of *Elizabeth Deane*, in case she should survive him, and also to convey, assign and settle in manner thereafter mentioned, any Real or Personal Property that might, thereafter, be given, descend or devolve on her, and to enter into the Covenants in that behalf thereafter mentioned: *Elizabeth Deane* conveyed and assigned, to the Defendants, *Richard Valpy* and *William Andrews*, their Executors, Administrators and Assigns, her one Fourth Part or Share of the Sums of 1,200*l.* Five per Cent. Annuities, and 600*l.* Bank Stock and the several Bonuses thereon, expectant respectively on the decease of *Sarah Anne Deane*, and all the accumulations thereof, and also her Moiety of the 1,000*l.* Three per Cent. Reduced Bank Annuities, expectant on her Father's decease, and all the Dividends and Interest which, thenceforth, during the Life of *Elizabeth Deane*, should grow due in respect of the 2,627*l.* 5*s.* 2*d.* Four per Cent.

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Bank Annuities, and also the Note for 500*l.*, and the Principal and Interest due thereon, and all other the Monies, or Securities for Money, and Personal Estate or Property, which she was then possessed of, or interested in, or entitled unto, in Possession, Reversion, Remainder or Expectancy, or other wise howsoever, (except her Wearing Apparel, Jewels, Trinkets, and other articles of her Dress and Ornaments of her Person,) in Trust, after the Marriage, as to the Dividends arising from the 2,627*l.* [*110]

5*s.* 2*d.* Stock, during the joint lives of *J. Lempriere* and *Elizabeth Deane*, for her separate use, and, if *J. Lempriere* should die in her lifetime, then to pay the same to her and her Assigns, during her life; and, as to the 500*l.*, secured by the Promissory Note, and all Interest due, and to grow due for the same, in Trust for such Persons and for such Intents and Purposes, as *Elizabeth Deane*, alone, and notwithstanding her Coverture, by any Deed or Instrument in Writing, with or without Power of Revocation and new Appointment, or by her last Will and Testament in writing, or any Codicil thereto, or any Writing in the nature of her last Will and Testament, should direct and appoint, and, in default of such direction or appointment, in Trust for *Elizabeth Deane*, her Executors, Administrators and Assigns, for her separate use; and, as to the one Fourth Share of the 1,200*l.* Bank Annuities, 600*l.* Bank Stock, and the Moiety of the 1,000*l.* Reduced Annuities, and all other the Trust Premises thereby assigned, and the Trusts whereof had not been declared, in Trust that, when the same should become vested, in the Trustees, in possession, by virtue of the Assignment thereinbefore contained, to sell the same, and invest the Proceeds in the usual Securities, and to stand possessed of the same upon Trust to pay the Interest and Dividends thereof to *J. Lempriere* and his Assigns, for his life, and, after his decease, in Trust to pay the Interest and Dividends to *Elizabeth Deane* and her Assigns (in case she should survive *J. Lempriere*) for her life, and, after the decease of the survivor, as to all the said Trust-monies and the Interest and Dividends thereof, in Trust for such Person or Persons, and for such intents and purposes, and in such manner and form as *Elizabeth Deane*, alone, notwithstanding her Coverture, by [*111] any Deed or Deeds, Instrument or Instruments in writing, with or without Power of Revocation and new Appointment, to be sealed and delivered, by her, in the presence of, and attested by Two or more credible Witnesses, or by her last Will and Testament in writing, or any Codicil or Codicils thereto, or any Writing or Writings in the nature of a Will or Codicil, to be signed and published, by her, in the presence of the like number of Witnesses, should, from time to time, direct or appoint, and, in default of such Direction or Appointment, in Trust for all and every the Children and Child of the Marriage, who, being a Son or Sons, should attain 21, or, being

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a Daughter or Daughters, should attain that age or be married under that age, to be equally divided between them if more than one, but, in case there should be no such Child of the Marriage, then in Trust for the Next of Kin of *Elizabeth Deane*, according to the Statutes of Distribution, and as if she had died unmarried, without Issue and Intestate. And *Elizabeth Deane* conveyed, to *Valpy* and *Andrews* and their Heirs, her Remainder or Reversion in Fee expectant on the decease of the Survivor of the Persons therein named, of and in one Fourth Part of the Messuage with the Appurtenances, situate in *Reading*, and also all other Lands and Hereditaments wherein she, or any Person in Trust for her, had any Estate of Freehold or Inheritance in Possession, Remainder or Expectancy in the County of *Berks*, or elsewhere within the *United Kingdom*, to hold the same to the use, after the Marriage, of *John Lempriere*, for life, and, afterwards, to the use of such Person or Persons, and for such Estate and Estates, Interest and Interests,

Ends, Intents and Purposes, and with, under and subject to such [*112] Powers, Provisoes, *Declarations and Agreements as *Elizabeth Deane*, alone, and notwithstanding her Coverture, by any Deed or Deeds, Instrument or Instruments in writing, to be sealed and delivered, by her, in the presence of Two or more credible Witnesses, or, by her last Will and Testament in writing, or any Codicil or Codicils in writing, or any Writing or Writings in the nature of a Will or Codicil, to be signed and published, by her, in the presence of Three or more credible Witnesses, should direct or appoint; and, in default of such Direction or Appointment, to the use of *Elizabeth Deane*, her Heirs and Assigns for ever. And the Indenture of Release contained a Covenant by *John Lempriere*, and Declaration by *Elizabeth Deane*, that in case, at any time during the Coverture, any Real, Personal, or mixed Estates or Effects, should come to, or vest in *Elizabeth Deane* or *John Lempriere*, in her Right, the same should be conveyed and assigned, by them, to *Valpy* and *Andrews*, as to such as should be Real Estate, to the same uses as were thereinbefore declared concerning the Real Estate of *Elizabeth Deane*, and, as to such as should be Personal Estate, upon the same Trusts as were thereinbefore declared concerning the 1,200*l.* Bank Annuities and 600*l.* Bank Stock, and 1,000*l.* Reduced Annuities.

The Marriage was celebrated on the 18th December 1813. Shortly afterwards Mrs. *Lempriere's* Father died; and, thereupon, her Share of the 1,000*l.* Reduced Annuities was transferred to the Trustees of the Settlement. In February 1818 Mrs. *Lempriere's* Mother died, and, in August following, her Share of the 1,200*l.* Bank Annuities was transferred to the [*113] same Trustees. In the same month, the Trustees of the Will of *Sarah Spicer*, transferred, to the Trustees of the Settlement, Mrs. *Lempriere's* Share of a Sum of 2,000*l.* Three per Cent. Reduced An

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nuities, which had been given in Trust for her Mother for Life, and, afterwards, for such of her Children as should survive her.

Sarah Bostock, who died in 1820, bequeathed a Legacy of 500*l.*, to the Trustees of the Settlement, upon the Trusts thereof, and in May 1825 that Legacy was paid to them, and they laid it out in the purchase of 619*l.* 3*s.* 8*d.* Three per Cent. Consols, in their names. The other Sums of Stock so transferred to the Trustees, were afterwards sold out by them, and the Produce was invested in the purchase, in their Names, of 991*l.* 10*s.* 1*d.* Navy Five per Cents., and that Sum was afterwards converted into 1,041*l.* 1*s.* 7*d.* New Four per Cents.

In April 1821, Mrs. *Lempriere* died having made her Will, dated the 4th of August 1818, in the words following, “I *Elizabeth Lempriere*, of *Exeter* in the County of *Devon*, give and bequeath to my dear Husband, the Rev. Dr. *Lempriere*, all the Property of which I may die possessed, or have in Reversion or in Expectation: and I appoint my said Husband sole Executor of this my last Will.” The Attestation Clause to the Will was as follows: “Signed and delivered in the presence of *W. H. Veale*, *W. V. Hennah*, *J. W. T. Fell*.”

Mrs. *Lempriere* left two Children only, the infant Defendants *Anne Lempriere* and *Charles Lempriere*. Dr. *Lempriere* proved his late Wife's Will, and shortly after her death he applied, to the Trustees of the Settlement, for a transfer of the Trust Property; but the Trustees declined to transfer it to him without the sanction of the Court [*114] of Chancery, and Dr. *Lempriere* died before he had commenced Proceedings to compel the Trustees to make the Transfer. By his Will, dated the 19th of May 1821, duly executed and attested, he gave, devised and bequeathed all his Freehold Lands and Hereditaments, and all his Personal Estate and Effects, to *James Parkin*, and to the Plaintiff *William Bury Moore*, and to his Son, the Plaintiff, *Everard Lempriere*, upon certain Trusts for the benefit of his Children, and appointed *Everard Lempriere* and *William Bury Moore* Executors of his Will. The Testator died on the 1st of February 1824, leaving seven Children, by a former Marriage, (who were Plaintiffs in the Cause) and the Defendants, *Anne Lempriere* and *Chas. Lempriere* his only Children by his marriage with *Eliz. Lempriere*, living at his death.

The Bill charged that Mrs. *Lempriere's* Will operated as a due execution of the Power of Appointment given to her by the Settlement, and that the Trust property was duly bequeathed and appointed to her Husband, and passed, by his Will, to his Executors, and that, therefore, the Plaintiffs, *Everard Lempriere* and *William Bury Moore* were entitled to have the Trust Property transferred, to them, for the purposes of his Will; but that

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the defendants *Anne Lempriere* and *Charles Lempriere* claimed, as the only Children of *Elizabeth Lempriere*, to be entitled thereto as in default of Appointment by her.

The Bill prayed that Mrs. *Lempriere's* Will might be established and declared to be a due execution of the Power of Appointment, of the Trust Property, given to her by the Settlement, and that the Defendants [*115] *Valpy* and *Andrews*, might be ordered to transfer the 1,041*l.* 1*s.* 7*d.* New Four per Cents., and 619*l.* 3*s.* 8*d.* Consols, to the Plaintiffs, *Everard Lempriere*, and *William Bury Moore*, as the Executors of Dr. *Lempriere*, and to pay them the dividends accrued thereon since Mrs. *Lempriere's* death, and also to pay to them, all such other Monies as might be then, or might thereafter come into their hands, in respect of the Trusts of the Settlement.

Two of the Witnesses to Mrs. *Lempriere's* Will, were examined for the Plaintiffs. They deposed that she, in their presence, and in the presence of the other Witness (who they had been informed and believed had since died in *Bengal*) signed the paper writing purporting to be her Will, and declared the same to be her Will, and that the Names of the Witnesses were of their respective proper Handwritings, and that they subscribed their Names, in the Testatrix's presence and in the presence of each other. The Witnesses, on their Cross-examination, said that the Testatrix signed the Paper Writing, and said that it was her Will, in their presence: and one of them added that he did not recollect whether she said that she published it as her Will.

Sir *E. Sugden* and Mr. *Whitmarsh*, for the Plaintiffs:

The question is whether Mrs. *Lempriere's* Will is a due execution of the Power reserved to her, by the Settlement, over the Funded Property: no question arises as to the Real Estates. Where a married Woman makes a Will, (which she has no capacity of doing except in execution of a Power expressly given to her) it is a strong circumstance to show that she intended to exercise that Power. Where a Person having a capacity to dispose [*116] of Property, as well as a Power over it, makes a Disposition of that Property, and it is equivocal whether he intended it to take effect, under the Power, or by virtue of his capacity, the Courts hold that it is not an execution of the Power. But a married Woman has no capacity to give, except by force of her Power, and, if she executes an Instrument, it can have no operation except under the Power; and therefore, the Court will not deny to it that operation, which alone can give it effect.

This Case does not fall within *Lovell v Knight* (a). In that Case, which

(a) *Ante*, vol. iii. p. 275. The Judgment was affirmed by the Lord Chancellor in December 1831.

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came before your *Honor*, on Further Directions, the Testatrix gave and bequeathed the whole of her property, both *Real* and *Personal*. It appeared, however, by the *Master's* Report, that she had no *Real* Property, but only terms for years. The Judgment seems to turn upon that point, and to treat the Will as if it had been made by a person who was *sui juris*. The argument founded on the disability of the Lady to make a Will except under the Power, was not adverted to. Here the Testatrix gives all the Property which she might die possessed of, or have in reversion or in Expectation. She had Property subject to the Power, of every one of those descriptions: and she had no Property in Possession, in Reversion, or in Expectation, which was not subject to the Power.

The Power over the 500*l.* secured by the Promissory Note, was to be exercised simply by a Will, or any Writing in nature of a Will: as to the Funded Property, *the Power was to be exercised by a [*117] Will signed and published by the Testatrix in the presence of Two or more credible Witnesses; but the Witnesses were not required to attest the signing and publication. The Attestation Clause expresses that the Will was signed and delivered by the Testatrix in the presence of the Witnesses. It appears however, by the Evidence, that the Will was duly executed according to the Power; and, besides, the delivery of a Will, has been decided to be equivalent to publication. *Trimmer v. Jackson* (b).

Mr *Pepys* and Mr. *Torriano*, for the Infant Defendants, *Anne Lempriere* and *Chas. Lempriere*:

The Decision in *Lovell v. Knight*, was affirmed on Appeal, and it is now the Law of the Court.

[The *Vice-Chancellor*:—In that Case, it appeared, by the *Master's* Report, that the married Woman had other Property than that which was comprised in the Settlement. She was entitled to 112*l.*, arising from Savings, in the hands of the Trustees of the Settlement.]

The Decision did not turn upon there being that Sum of 112*l.*, and the Terms of the Will were not referrible to it. The Judgment in that Case, was founded on the general principle, which is that an Instrument shall not be held to be an exercise of a Power, unless it clearly refers to the Power, or to the Property which is the subject of it. The Terms used by Mrs. *Lempriere*, are quite as general as those used, by the Testatrix, in *Lovell v. Knight*: and there is nothing, either in the expressions in the *Will, or in the nature of the Property, which can distinguish the [*118] one Case from the other.

The Witnesses have stated what was done and said by the Testatrix in their presence. It is not clear, from their evidence, that the Will was pub-

(b) 4 Burn's Eccl. Law, 130; and see *Simeon v. Simeon*, ante, vol. iv. p. 555.

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lished : the Attestation Clauses expresses it to have been signed and delivered ; and one of the Witnesses says that he does not recollect whether anything was said about publication.

Mr. *Knight* and Mr. *James Russell* appeared for the Defendants, *Valpy* and *Andrews*, the Trustees of the Settlement.

The VICE-CHANCELLOR, after stating the Trusts of the Settlement, and the Covenant for settling the Real and Personal Property which might thereafter vest in Mrs. *Lempriere*, or in her Husband in her Right, continued as follows :

It does not, however, appear that there was any such subsequent Real or Personal Estate.

There were two Children of the Marriage. Mrs. *Lempriere* died in the lifetime of her Husband, having made a Testamentary Instrument in these words : “ I *Elizabeth Lempriere*, of *Exeter* in the County of *Devon*, give and bequeath, &c.

The Attestation Clause to this Will was as follows : “ Signed and delivered in the pretence of, &c.”

This Instrument was duly proved by Dr. *Lempriere*.

[*119] ‘It was said that there was no question as to the Real Estate, and none was raised at the Bar. The only question was as to the Funded Property, and, with respect to that, it was said : 1st, That the Will could not be objected to as an insufficient execution of the Power, by reason that the Witnesses attested its signing and delivery only, and not its publication : and, 2dly, that, taking the Will to be duly signed and published, it operated as an appointment of the Property in question.

Upon the first point it is observable that the terms of the Power did not require the Witnesses to make any written attestation at all. The Case is, therefore, free from the objection that was made in *Moodie v. Ried*(c), and the Cases there referred to, where the Witnesses did not sign an Attestation, in writing, of the signing and publishing, which were required to be attested. But even admitting those Cases to be Law, it appeared, by the Evidence in this Cause, as well as by the written Attestation, that the Will was produced and delivered by Mrs. *Lempriere*. In *Moodie v. Ried* Lord Chief Justice *Gibbs* says : “ If the act of the Testatrix, in calling on the Witnesses to attest her Will, be a publication of it, then their attesting that she signed it, attests her publication also ; because they attest that by which she publishes it.” His Lordship also says : “ I do not know what the publication of a Will is. I can only suppose it to be that by which a Person designates that he means to give effect to a Paper as his Will.” And, consistently with what the Lord Chief Justice is reported to have said, my opi-

c) Taunt. 355, and 1 Mad. 516.

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nion is that the Will, in this Case, by having been first signed, and then delivered, *to the Witnesses, by Mrs. *Lempriere*, in order [120] that they might attest it, has been duly signed and published by her within the Terms of the power.

Upon the second point, it was forcibly urged that, where a Person has a Power, but no capacity to give except by force of the Power, an Instrument professing to give, can only operate as an execution of the Power, and, therefore, must be an execution of the Power, if duly executed within the Terms of the Power; and it was said that this observation is especially applicable to the Case of a Feme Coverte, who has no inherent Power in herself to make a Will. It appears to me that these observations cannot affect the present Case; because, though a married Woman in some sense has no Capacity to give, yet, under certain circumstances, she may give, with the consent of her husband, and even against his consent. If she has in herself a representative character, by being the Executrix of a Party deceased, by making a Will and appointing her Husband, or any other Person her Executor, she may, provided her Husband consents that her Will shall be proved, transmit to him or her other Nominee, her own representative character; and many Cases may be put, in which it will be more beneficial, for her Husband or other Persons connected with her, that the representation by Executorship should be continued, than that it should be destroyed. She may have Property settled, simply, to her separate use; and her Will making a general Disposition of her Property, would pass what is so settled. In this very Case, the Settlement which gives rise to the question before the Court, shows that Mrs. *Lempriere* had property, namely, the 500*l.*, settled, simply to her separate use, which would pass by a *general Gift [*121] made by Will. It cannot, therefore, be assumed, on principle, that the Will of a Feme Coverte is, of necessity, altogether inoperative as a Will. And no Case has been quoted, nor, at the hearing did I recollect any, nor have I since been able to find any, in which it has been held that the Will of a Feme Coverte, professing to give all her Property, in general terms, must be taken to be an execution of mere Powers, which she may possess. If any such case had existed, the Counsel for the Plaintiff, whose able Treatise on the Doctrine of Powers, is so well known to the Profession, would have named it.

The Will of Mrs. *Lempriere* seems to me to be nothing more than a general Gift of her Property, not referring to the Power which she had, or the subject of the Power, and, therefore, according to the known Rule, as laid down in *Standen v. Standen* (d), *Standen v. M^r Nab* (e), *Bennet v. Abur-*

(d) 2 Ves. jun. 589.

(e) 6 Bro. P. C. 193. 2d Edition.

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row (f), *Jones v. Tucker* (g), *Jones v. Curry* (h), not an execution of her Power.

This is my opinion of the Case, independently of the Decision in *Lovell v. Knight*. The original Decision upon that Case, I should have considered as of little weight; but, as it has been affirmed by the *Lord Chancellor*, I am not now at liberty to depart from it, and it seems to me to govern the present Case. I, therefore, decide that Mrs. *Lempriere's* Will, was not an execution of her Power over the Shares of the Bank Annuities.

[*122]

PICKFORD v. HUNTER

1831 : 24th November.—*Pleading — Creditor's Suit.*

To a Creditor's Bill, the Defendants pleaded a Decree obtained, by other Creditors in a prior Suit. Plea over-ruled: the Decree being less beneficial to the Plaintiffs than they might obtain in their own Suit.

THE Bill, which was filed on the 18th of June 1831, against *William Hunter*, *William Watkin*, and *Rebecca Nicks* an Infant, stated that, previous to 1826, the Plaintiffs carried on, and did still carry on the business of common Carriers, in copartnership together, in *London*; that, in the course of their business, they had large dealings at *Leamington*, in the County of *Warwick*; that, in 1825, they agreed with *Richard Nicks*, that he should act, as their Agent, in managing their Concerns at that place, and that he should be responsible, to them, for all Freights and Carriages of Goods coming to his hands, as their Agent, and chargeable at *Leamington*; and that the Plaintiffs should pay to him a Commission, of Five per Cent., upon the amount of all such Freights and Carriages: that *Nicks* received various Sums of Money, from different Persons, on the Plaintiffs' account, but he had not accounted, to them, for such Monies, since the 31st of December 1829, and that, at his death, he was indebted to them, on account of such monies, after deducting his Commission, in the Sum of 25*l.* 14*s.* 6*d.*: that he was also, at his death, indebted, as it was alleged, to several other Persons, and that he was, at the time of making his Will and Codicil after mentioned, and at his death, seised in Fee of divers Real Estates, and that he was, at his death, possessed of considerable Person-

* The Report of this Case has been postponed on account of the Editor being delayed in procuring the Briefs.

(f) 8 Ves. 609.

(g) 2 Mer. 533.

(h) 1 Swanst. 66.

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al Estate ; and that he made his *Will dated the 27th of March [*123] 1830, and executed and attested so as to pass Freehold Estates, and thereby, after giving a small Annuity as therein mentioned, he gave the Residue of his Estate and Effects, Real and Personal, to his Daughter, the Defendant *Rebecca Nicks*, her Heirs and Assigns, and appointed the Defendant *William Hunter*, sole Executor of his Will and Guardian of his said Daughter ; that the Testator made a Codicil to his Will, dated the 28th of March 1830, and which was also executed and attested so as to pass Freehold Estates, and he thereby appointed the Defendant, *William Watkin*, to be an Executor to his Will, jointly with *Hunter*, and empowered them to sell his Real Estate, and to convey the same to the Purchaser or Purchasers thereof, and the Monies arising from such Sale to be disposed of as his Personal Estate ; that the Testator died on the 28th of March 1830, leaving the Defendant *Rebecca Nicks* his only Child and Heiress at Law, and that *Hunter* and *Watkin* duly proved the Will and Codicil on the 7th of October 1830 : that, upon the death of the Testator, *Hunter* and *Watkin* entered into Possession or Receipt of the Rents and Profits of the Testator's Real and Leasehold Estates, and had ever since continued in such Possession or Receipt, and had possessed all the Testator's Personal Estate : that *Nicks* carried on, at his death, the Trades or Businesses of a Carpenter and Builder and Timber-merchant and Wharfinger, and was, as carrying on such Trades or Businesses, at his death, a Trader, liable to the operation of the Bankrupt Laws. The Bill charged that the Defendants, the Executors, had not only not used due diligence in administering the Testator's Assets, but that, in fact, with a view of delaying the Payment of the Testator's Debts, and of having a pretence for *delaying such Payment, [*124] a common Creditor's Bill had been filed, on the 17th of December 1830, by *Matthew Chinn* and *William Langham* and *William Francis Patterson*, as Creditors upon the Testator's Assets, and that such Bill was filed against the Defendants, *Watkin*, *Hunter*, and *Rebecca Nicks* : that the Plaintiffs in the present Suit, had ascertained that *Patterson* was the Solicitor who instituted the former Suit, and that no Answer had been put in by any of the Defendants to that Suit ; but that appearances had been entered, for all of the Defendants thereto, by *Patterson*, as their Solicitor, and that that Suit was, altogether, a friendly Suit, and had been instituted with a view of preventing any other Creditor of the Testator from instituting a Suit, and with the intention, in case any other Creditors should institute a Suit, of Proceeding, in the Suit so instituted by *Patterson* as aforesaid, to obtain a Decree as speedily as possible, in order that the Defendants, *Watkin* and *Hunter*, might keep the disposal of the Testator's Assets under their own control : That *Chinn* (who was a Bricklayer) was interested with the Testator in

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various portions of his Leasehold Estates, and was desirous of obtaining the Testator's share therein; and that *Patterson* was the Solicitor of the Testator in his lifetime, and that, since the Testator's death, he had been and was then the Solicitor of the Testator's Executors: that *Hunter*, who principally acted as Executor under the Will and Codicil, claimed to have an Interest in the Testator's Freehold and Leasehold Estates, by reason, as he alleged, of some Charge or Incumbrance for 800*l.*, executed to him by the Testator: that the Testator, was not at his death, indebted, to *Hunter*, in any Sum of Money whatever; and that, if he was so indebted, the same was [*125] merely a simple-contract Debt. The Bill *prayed that an Account might be taken of what was due to the Plaintiffs, on the Account thereinbefore mentioned, and also of the Testator's Personal Estate, and also of his Debts, Funeral and Testamentary Expenses; and that the Personal Estate might be applied in payment of the Debts due to the Plaintiffs, and the other Creditors of the Testator, in a due course of administration, and in case the Personal Estate should not be sufficient for the payment of all his Debts, then that the deficiency might be made good by Sale or Mortgage of his Real Estates, and that the proper or necessary Sales or Mortgages might be directed accordingly; and that, in the meantime, a Receiver might be appointed of the Rents of the Testator's Freehold Estate.

To this Bill, the Defendants, *Hunter* and *Watkin*, put in a Plea alleging that long before the Plaintiffs filed their Bill, to wit, on the 17th Dec. 1830, a Bill of Complaint was exhibited, in the Court of Chancery, by *Matthew Chinn*, *William Langham* and *William Francis Patterson*, on behalf of themselves and all other the Creditors of the Testator, against the Defendants *Watkin* and *Hunter* and *Rebecca Nicks*, thereby, amongst other things, stating the Will and Codicil, and the Death of the Testator, leaving *Rebecca Nicks* his only Child and Heiress at Law, and that *Watkin* and *Hunter* had duly proved the Will and Codicil: and also stating that the Testator was indebted, to the Plaintiffs in that Suit, and to divers other Persons at the time of his decease, and that he was a Trader within the operation of the Bankrupt Laws, and praying that an Account might be taken of what was due, to the said Plaintiffs in that Suit, and the other Creditors of the Testator, and that an Account might also be taken of the Testator's

[*126] *Personal Estate received by *Watkin* and *Hunter*, or by their order, or for their use, and that such Personal Estate might be administered under the direction of the Court, and, if necessary, that the Testator's Real Estate, or a competent part thereof, might be sold, and that all proper Parties might be decreed to join in such Sale, and that, out of the Testator's Personal Estate and Effects, and the Monies to arise from the Sale of his Real Estate, the Plaintiffs in that Suit and all other the Creditors

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of the Testator, might be paid their several demands, in a due course of administration, and that all necessary Accounts might be taken of the Testator's Real Estates and that a Receiver might be appointed of the Rents of the Real Estates and of the outstanding Personal Estate of the Testator, and that all necessary directions might be given for effectuating the purposes aforesaid. The Plea further alleged that *Watkin* and *Hunter* and *Rebecca Nicks* appeared to the Bill, and put in their Answers thereto, and that the Cause came on to be heard, before *The Master of the Rolls*, on the 30th of July 1831, when it was referred to the *Master* in rotation to take an account of what was due, to the Plaintiffs in that Suit, and all other the Creditors of the Testator, and of his Funeral Expenses, and to compute Interest on such of his Debts as carried Interest after the usual rate, and the *Master* was to cause Advertisements to be published in the usual manner for the Creditors of the Testator to come in and prove their Debts: and it was ordered that the *Master* should take an account of the Testator's Personal Estate come to the hands of his Executors, or of any other Person, &c., and that the Testator's Personal Estate should be applied in payment of his Debts and Funeral and Testamentary Expenses in a course of administration, and that *Watkin* and *Hunter* should be at liber- ['127] ty, with the approbation of the said *Master*, to compromise or compound any Debts due to the Testator's Estate, and that the Plaintiffs in that Suit, should be at liberty to exhibit an Interrogatory or Interrogatories, in the Examiner's Office, and examine Witnesses thereon, to prove the due execution of the Will of the Testator, and that the Testator was at his death a Trader within the true intent and meaning of the Statute made in the 47th year of the reign of his late Majesty King George 3, intituled, "An Act for more effectually securing the payment of the Debts of Traders:" and, for the better taking the said Accounts, the Parties were to produce before the *Master* upon oath all Books, &c., and were to be examined upon Interrogatories, &c. And the consideration of all further directions and the Costs of that Suit were reserved until the *Master* should have made his Report: and any of the parties were to be at liberty to apply, &c. The Plea further alleged that the said Decree was regularly passed and entered, and that the same had been carried into the *Master's* Office, and that the necessary proceedings were to be immediately had in the said Office: and that the said Decree was still in force and had not been impeached or set aside or complained of or appealed from. And the Defendants averred that the Rights and Claims of the Plaintiffs in that Suit of and in the Testator's Estates and Effects, and the Rights and Interests of the Plaintiffs in this Suit, of and in the same Estates and Effects, were the same: and they pleaded the Decree in bar to the Bill.

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Mr. *Knight* and Mr. *Lynch* for the Defendants *Watkin* and *Hunter*, in support of the Plea, said that it was a Plea of a Decree in a [*128] Creditor's Suit, to a Bill by other Creditors, which prayed nothing more than was prayed by the Bill in the prior Suit : that, if that Suit was improperly conducted, the Plaintiffs in this Suit, ought to have moved to have the conduct of it : that, when a Decree had been obtained in a Creditor's suit, the Court would not allow any other Suit, of the same nature, to proceed ; and that it made no difference in that respect, that the Decree pleaded had been obtained, subsequent to the filing of the Bill in the second Cause.

Sir *E. Sugden* and Mr. *Purvis*, for the Plaintiffs, *Pickford & Co.*, in support of the Bill, said that the course which the Defendants ought to have taken, was, not to plead the Decree, but to move to stay the Proceedings in the second Cause ; for that, after a Decree in a Creditor's Suit, the Court would stay Proceedings, by other Creditors, both at Law and in Equity (a) : that there were other grounds on which the Plea ought to be over-ruled, for the Plaintiffs in the first Suit, had not proved the Will, at the hearing of the Cause, or that the Testator was a Trader, and consequently that their Suit did not entitle them to affect his Real Estates ; so that they had not obtained so beneficial a Decree as the Plaintiffs in this Suit were entitled to : that the office of a Plea in Bar, was to get rid of the Plaintiff's Demand : that the Plaintiffs in this Cause, had not gone in under the Decree and proved their Debt : and that the Plea did not aver that the Parties and Interests were the same in both Suits, but that the Plaintiffs in the other Suit, had the same Rights and Interests as the Plaintiffs in this Suit. *Lechmere v. Brasier* (b), *Neve v. Weston* (c), *Law v. Rigby* (d).

[*129] *Mr. *Knight* in reply, observed that, in *Lechmere v. Brasier*, the Court had directed the Intestate's Real Estates to be sold, before it had been proved that he was a Trader ; which was clearly irregular ; and that, though an order to stay the Proceedings, in this Suit, might have been obtained upon Motion, the Defendants were not compelled to adopt that course, but were at liberty to plead the Decree in Bar to the second Suit.

The VICE-CHANCELLOR :

The Decree, as it is pleaded, is not so beneficial, to the Creditors, as that which the Plaintiffs in this Suit may obtain. It is not represented that any Debt has been proved in the Suit which has been instituted by Mr. *Patterson*, or that there is, in that Suit, any proof of the execution of the Will and

(a) 8 Ves. 520.

(b) 2 Jac. & Walk. 287.

(c) 3 Atk. 557.

(d) 4 Bro. C. C. 60.

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Codicil, or of the Testator being a Trader at his death. The consequence is that the Decree which has been obtained in that Suit, is a Decree which affects the Personal Estate only of the Testator: and, moreover, as no Debt appears to have been proved, in that Suit, the Decree is manifestly erroneous. The Decree in the former Cause, ought to be as beneficial to the Plaintiffs, as that which they may obtain in their own Suit: but the Decree which has been pleaded, is, at all events, one degree further from final decision than that which the Plaintiffs in this Suit may obtain.

The Averment, in the Plea, that the Rights and Interests of the Plaintiffs in both Suits, are the same, is not true; for the Right of A. to be paid his Debt, is not the same as the Right of B. to be paid his Debt.

Plea over-ruled.

*NEWTON v. THE EARL OF EGMONT.

[*130]

1832: 13th January.—*Pleading.—Parties.*

Where Estates have been conveyed, to Trustees in Trust for such of the Creditors of the Grantor as should execute the Conveyance, and a Bill is filed, by an Incumbrancer (some of whose Securities are prior, and others, subsequent to the Trust-deed) praying that his Rights and Interests under his Securities, may be established, and the Priorities of himself and the other Incumbrancers, declared, all the Creditors who have executed the Conveyance, however numerous they may be, must be made Parties to the Suit.

In pursuance of the permission to amend the Bill, granted on the Demurrer *ore tenus* in this Cause, being allowed (a), the Plaintiff added *William Forsyth*, as a Defendant to the Bill, and introduced the following Allegation into it: "That the said Indenture of Release (b), was executed by Thirty (c) Creditors of the said *John Earl of Egmont*, as Parties thereto of the Second Part, and, among others by *John Wain* and *William Forsyth*, Defendants hereto, and such Creditors are too numerous to be all made Parties to this Suit, and no Person has executed such Indenture as a Party thereto of the Third Part, and there is not any such Party; and your Orator is ignorant of the Priorities and Interests of the said Parties thereto of the Second Part, and of the nature and amount thereof, and is ignorant of their Residences, and whether they are living or dead, save as to the two last named Defendants, and save that none of the said Parties of the Second Part, was an Incumbrancer, except as a Judgment Creditor, and your Orator is altogether ignorant, save as aforesaid, who are the Persons interested

(a) See *Ante*, vol. iv. p. 585.

(b) The Release of 2d Nov. 1824.

(c) By the Plea it appeared that the number

of Persons who had executed the Release, as Parties of the Second Part, but who were not Parties of the Suit, was twenty-six.

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under, or entitled to the benefit of the Trusts of such Indenture, or in any manner interested in the said Property.”

[*131] “The Defendant *John Godfrey Teed* put in a Plea to the whole of the amended Bill, which, after setting forth the Prayer of that Bill, alleged that by Indentures of Lease and Release, bearing date, respectively, the 1st and 2d days of November 1824, (being the Indentures of those dates in the Bill mentioned) the Release being made between the said *John Earl of Egmont*, of the First Part, and the several Persons whose names, &c., certain Manors and other Hereditaments in the County of *Somerset*, and including, amongst others, the Estates comprised in the said Complainant’s alleged Securities, and in respect whereof he seeks to obtain the relief prayed by his Bill, were duly conveyed and assigned, by the said *John Earl of Egmont* and Viscount *Perceval*, unto and to the use of the said Viscount *Perceval*, this Defendant, and the said *Edward Tierney*, their Heirs and Assigns, upon certain Trusts therein expressed for the benefit, amongst other things, of the several Creditors of the said *John Earl of Egmont* whose names should be set down in the Second Schedule thereto annexed, and who, by themselves, or their Agents or attornies, should execute the said Indenture of Release and thereby become Parties thereto of the Second Part, and for providing for the payment of the Debts of such several Creditors by means of the said Estates and the Trust Funds to arise therefrom, and the Rents, Profits and Produce thereof: and it was by the said Indenture, agreed and declared, and the said *John Earl of Egmont* did thereby direct that it should be lawful for the said Trustees or Trustee for the time being, to sign, issue and deliver, to all and every the Creditors of the said Earl whose Debts should be so respectively allowed, settled or compromised for as therein mentioned, any assignable Debentures, or

[*132] Certificates of acknowledgment *of or for the amount of the several and respective Debts so allowed, settled or compromised, such Debentures to represent the Debt or respective Debts, Sum or Sums of Money for which they should be signed and issued as aforesaid, and to be made payable, to the Creditors or Persons entitled to such Debts or Sums of Money, their Executors, Administrators and Assigns, out of the respective Trust Funds thereby provided and established for the payment thereof, so that every Creditor or other Person accepting such Debenture, should enter into an engagement not to sue or molest the said Earl, or the said Viscount *Perceval* as his Surety, (if he should be such Surety,) according to the form of, or in substance or effect similar to the Debenture or Engagement set forth in the Schedule thereunder written, or as near thereto as the circumstances of each case might require, a counterpart of which Debenture and Engagement should be signed by such Creditors: and it was further declared and

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provided that Creditors by Judgment, and Persons having Charges and Liens upon the said Manors and Hereditaments, who should sign and execute the said Indenture, should accept and receive such Debentures, and sign such Engagements as aforesaid, in lieu, and by way of substitution for the Securities held by them respectively, and, in respect of which and the Monies thereby secured, they should respectively sign and execute the said Indenture, but, nevertheless, each such Debenture should, with reference to the other Debentures thereby authorized to be given, or to any other claims, have such priority, in point of Payment and Security, as the original Security or Securities in lieu of which the same should be substituted, and, with reference to the other general Securities, would have had or been entitled to, in case all the same Securities had been subsisting, [*133] and had not been paid according to their Priorities. The Plea then alleged that Sir *E. Kerrison*, of *Oxne Hall*, in the County of *Suffolk*, Bart., *Richard Denney*, of *Bergh Apton* in the County of *Norfolk*, Esq., *William Lord Bishop of Sodor and Man*, and Twenty-three other Persons (whose names, places of residence and additions were mentioned, except *William Mills Pulley*, whose residence and addition were omitted) were, together with the Defendants *Wain* and *Forsyth*, the several Persons whose names were set down in the First Schedule to the Release of the 2d of November 1824, and who, by themselves or their Agents or Attornies, had all executed that Deed, and had, thereby become Parties thereto of the Second Part, and that Debentures had been signed, issued and delivered to all such Persons, by the Defendants, Viscount *Perceval*, *J. G. Teed*, and *Edward Tierney*, pursuant to the Provisions of the Release, for the Amounts of their respective Debts, which had been allowed, settled and compromised as mentioned therein. The Plea further alleged that all the Twenty-six Persons before mentioned, as Creditors entitled to the benefit of the Indentures of November 1824, were or claimed to be interested in the taking of the Accounts prayed by the Bill, and in contesting the priority which it sought to establish in favour of the Plaintiff's Securities, but, nevertheless, they were not made Parties to the Bill.

Sir *E. Sugden* and Mr. *Girdlestone jun.*, for the Defendant, *J. G. Teed*, in support of the Plea, contended that all the Persons who were Parties to the Release, of the Second Part, were necessary Parties to the Suit. Their arguments were substantially the same as were *of- [*134] fered on that point, on the Hearing of the Demurrer *ore tenus*.

Mr. *Knight* and Mr. *Spence*, for the Plaintiff:

It is laid down by Lord *Eldon*, C., in *Adair v. The New River Company (d)*, that, where the Parties interested in the subject of a Suit, are so

(d) 11 Ves. 429. See 443, et seq.

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numerous that it would be impracticable, or even inconvenient to make them all Parties, it is not necessary, for the purpose of obtaining a Decree, to bring them all before the Court. The same doctrine is laid down in *Cockburn v. Thompson (e)*. No decree would be made in this Suit, which would affect any of the Creditors who are not Parties to it. Advertisements would be directed to be published, and every Creditor would go in under the Decree and establish his Claim, in the *Master's* Office; so that the Rights of none of the Creditors would be decided upon, in their absence. The Persons who are Parties to the Release of November 1824, of the Second Part, are Judgment Creditors merely: that Deed has not been executed by any of the Persons who were Parties to it of the Third Part. The places mentioned in the Plea, as the Residences of the Parties of the Second Part, (who are stated to be Thirty in number) may have been their Residences at the time when the Deed was executed, but may have ceased to be so now; and, as to one or two of those Parties, no place of Residence is mentioned. The Plea ought to have set forth the places where the Parties resided at the time when it was filed.

[*135] "The Plea contains no Averment that the Debentures continue in the hands of the Persons to whom they were originally given. It is not sufficient to aver that a Party was interested, at a particular time, and that he now claims to be interested in the subject matter of the Suit; nor is there any allegation in the Plea that the Persons named, are all the Persons who have executed the Release as Parties of the Second Part.

This Plea does not give any information as to the Priorities of the several Creditors. It states the Trusts of the Release in a vague and general manner, and brings forward no new fact whatever: and Pleas have been frequently over-ruled on that ground. *Billing v. Flight (f)*, *Steff v. Andrews. (g)*.

The VICE-CHANCELLOR:

The Bill sets forth the Decree in Mr. *Wain's* Suit; and it represents that the Plaintiff, Mr. *Newton*, was desirous of going in before the *Master*, under the Decree in that Suit; but that some of the Parties refused to allow him to have the benefit of that Decree. Then he files his Bill praying to have his Priority ascertained. The Bill alleges that the Release was executed by Thirty Creditors of Lord *Egmont*, as Parties thereto of the Second Part, and, amongst them, by the Defendants *Wain* and *Forsyth*, and that such Creditors are too numerous to be all made Parties to the Suit, and that the Plaintiff is ignorant of the Priorities and Interests of the Parties to the Release of the Second Part, and of their Residences, and whether they are living or dead, save as to the two last-named Defendants, and that the Plain-

(e) 16 Ves. 321.

(f) 1 Madd. 230.

(g) 2 Madd. 6.

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tiff is altogether ignorant, save as aforesaid who are the *Persons entitled to the Benefit of the Trusts of the Release. [*136] This allegation was introduced into the Bill, after the Demurrer *ore tenus* for want of Parties, had been allowed. So that, *primâ facie*, the Plaintiff, by his Amendment, admits that those Persons ought to have been made Parties, unless a sufficient reason is assigned for not making them Parties. To this Bill Mr. *Teed* has put in a Plea which obviates the reason, by giving the Names and Residences of Twenty-six Parties, with the exception of Two, namely, the Bishop of *Sodor and Man*, and *W. Mills Pulley*. With respect to the Bishop of *Sodor and Man*, it was not necessary to name his Residence: and, some of the Parties being sufficiently described to enable the Plaintiff to amend his Bill, it is immaterial that the Residence of one is omitted.

It was said, by the Plaintiff's Counsel, that the Debentures were assignable; and that the Plea ought to have averred that they remained in the hands of the Persons to whom they were originally given: but I do not think that any such Averment was necessary; because it must be presumed that the Debentures remain with the original holders of them, until the contrary is shown: besides, the Plea alleges that the Parties are, or claim to be interested in the subject matter of the Suit; and that allegation is a sufficient Answer to this second objection.

It was then said that the Plea does not aver that no Persons, besides those mentioned in the Plea, have an interest in the subject of the Suit.— But it was not necessary to make any such Averment. It was quite sufficient to state that the Twenty-six Persons are interested in the Suit.

*Then it was said that a Plea must add to the Contents of the [*137] Bill, but that this Plea did not do so, nor did it give any information as to the Priorities of the several Creditors. The Plea, however, does add to the Contents of the Bill; and it could give no information as to the Priorities, which the Bill itself seeks to have ascertained and declared by the Court.

The last and most important objection is that which regards the number of Persons, who, it is stated, ought to be made Parties to the Suit. I accede to the Rule laid down in *Adair v. The New River Company*. That Rule, however, applies only to Cases where there is one general Right in all the Parties, that is, where the character of all Parties, so far as the Right is concerned, is homogeneous: as in Suits to establish a Modus, or a Right of Suit to a Mill. Notwithstanding the inconvenience arising from numerous Parties, there are some Cases in which they cannot be dispensed with.— Thus, if a Bill is filed to have the benefit of a Charge on an Estate, all Persons must be made Parties who claim an Interest in the Charge. In this

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Case, where the question is Priority of Charge, the very nature of the question makes it necessary that all the Creditors should be Parties : it implies a contest with every other Person claiming an Interest in the Land. The circumstance of the Persons named in the Plea, being Judgment Creditors, does not remove the difficulty ; for there may have been Releases, Assignments, want of Docketting, and other circumstances affecting each Claim.

I am, therefore, of opinion that all the Persons named in the [*138] Plea, are necessary Parties to the Suit ; and, consequently, the Plea must be allowed. But I shall give the Plaintiff leave to amend his Bill, for the purpose of making them Parties.

FOLEY v. PARRY.

1832 : 14th January.—Will.—Construction.—Trust.

Testator gave his Real and Personal Estates to his Wife, for life, Remainder to his Great-nephew, *F. W.* Son of his late Nephew, and expressed it to be his particular wish and request that his Wife, together with *F. W.*'s Grandfather, should superintend and take care of his Education, so as to fit him for any respectable Profession or Employment: Held, that *F. W.* was entitled to be maintained and Educated, during his Minority, in the manner described, out of the Income of the Testator's Estates.

WILLIAM PARRY, Esq., by his Will, dated the 12th of June 1812, devised his capital Messuage or Mansion-house, called the *Ware*, situated in the Parish of *Kenchester*, in the County of *Hereford*, and all other his Real Estates, situate in, or adjoining to the Parish of *Kenchester*, unto *Edwin Sandys Lechmere* and *Bigoe Charles Williams*, and their Heirs, to the use of his Wife, the Defendant *Jane Parry*, for her life, with Remainder to his Great-nephew, the Plaintiff, Son of his late Nephew, *William Foley*, for his life, with Remainders to the Sons and Daughters of the Plaintiff, successively, in Tail, with Remainder to *Thomas Mell* in Fee. And the Testator bequeathed all his Plate, Linen, China, Books, Household Goods, Furniture, Farming Stock and other Effects whatsoever, which, at his death, should be in and about his Mansion-house, (except Money and Securities for Money) to his Wife, for her own absolute Use and Benefit ; and, after giving various Legacies and Annuities, he gave all the Residue of his Real and Personal Estate to his Wife, and *Bigoe Charles Williams*, absolutely, [*139] upon Trust, to sell the same, and to stand possessed of the produce thereof, in Trust, thereout, to pay his Funeral and Testamentary Expenses, Debts and Legacies, and to invest the Residue on Real or Government Securities, and to stand possessed of such Securities, in Trust to pay the Annuities given by his Will, and, subject thereto, in Trust

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to pay the Dividends and Interest thereof to his Wife, for her life, and, after her decease, in Trust for the Plaintiff, his Executors, Administrators, and Assigns, and to assign and transfer the Capital thereof, accordingly, on his attaining the age of 21 years. The Testator then expressed himself as follows: "*It is my particular wish and request that my dear Wife and Walter Williams, Esq., the Grandfather of the said Walter William Foley (the Plaintiff) will superintend and take care of his Education, so as to fit him for any respectable Profession or Employment.*" And the Testator appointed his Wife and *Bigoe Chas. Williams* Executrix and Executor of his Will.

The Testator died in November 1813, leaving the Plaintiff and *Thomas Mell* his Co-heirs at Law.

The Bill stated that the Testator, in his lifetime, placed the Plaintiff at School, and paid the Expenses of his Education and Maintenance, and continued to maintain and support him until his death, and that, but for such support, the Plaintiff could not have been educated and maintained so as to fit him for any respectable Profession or Employment, the Plaintiff's Mother being a Widow, and living abroad, and being wholly unable to contribute to his support: That *Jane Parry*, the Testator's Widow, never superintended or took care of the Plaintiff's Education, or supplied [*140] him with Necessaries, and that, after the Testator's death, he was compelled to procure himself to be educated and maintained, and fitted for a respectable Profession, by pledging his own responsibility: that, in April 1826, the Plaintiff attained 21: that he was liable for the Food, Clothing and other Necessaries supplied to him during his minority, and had also incurred liabilities for putting himself out as an articled Clerk to an Attorney during his minority, so as to fit him for the profession of a Solicitor, and had also incurred liabilities for his necessary sustenance and support, since he attained 21: that *Mrs. Parry* had refused to pay him a sufficient sum of Money to enable him to pay off the Debts and Liabilities so incurred by him, and to reimburse him the Expenses necessarily incurred in his Maintenance and Education. The Bill charged that the aforesaid request in the Will, was intended to be and was obligatory on *Mrs. Parry*, and that, according to the plain intent of the Will, the Testator's Real and Personal Estates were devised and bequeathed to *Mrs. Parry* for her life, in the trust and confidence that she would sustain the Expense of educating the Plaintiff and qualifying him for a respectable Profession, more especially as the Testator wholly supported him down to the time of his death, and that the Plaintiff had no property out of which he could have been educated and supported as contemplated by the Will: and that the Plaintiff had been compelled, in order to discharge the Liabilities which he had incurred, to sell two Third Parts of his Share and Interest in the Sum of 8,733*l.* 8*s.* 7*d.* Three per

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Cent. Consols, part of the Trust Funds belonging to the Testator's Estate, to the Defendants *Bell, Chapman and Wray*.

[*141] *The Bill prayed that the Will might be established, and the Trusts performed, and that the usual Accounts might be taken of the Testator's Real and Personal Estates, and that it might be declared that, according to the true construction of the Will, the Plaintiff ought to have been maintained and educated, so as to fit him for a respectable Profession, out of the annual Income of the Testator's Estate, or, at least, out of the Capital of his Residuary Estate so devised and bequeathed as aforesaid ; and that it might be referred, to one of the *Masters* of the Court, to take an account of the Expenses so incurred as aforesaid in the Maintenance and Education of the Plaintiff and the fitting him for the profession of a Solicitor : and, in case the Court should be of opinion that the same ought to have been found and paid, by Mrs. *Parry*, out of the Rents and annual Proceeds of the Trust Property, then that she might be ordered to pay, to the Plaintiff, what the *Master* should report to be due : and, in case the Court should be of opinion that the same ought to have been paid out of the Capital of the Residuary Trust Property, then that a sufficient part of such Trust Property might be applied for that purpose : and that it might be referred, to the *Master*, to approve of a proper Sum to be allowed and paid, for the future maintenance of the Plaintiff, out of the Income or Capital of the Trust Funds.

Mrs. *Parry*, by her Answer, said that, in 1810, the Testator, with the concurrence of the Plaintiff's Grandfather, (the Plaintiff's Father having then lately left this Country for *India*,) placed the Plaintiff at School, and paid for his Education, up to Midsummer 1813, out of 190*l.*, which was left with the Testator, by the Plaintiff's Father for that purpose, save [*142] that 13*l.* 7*s.*, for one *Moiety of the Plaintiff's School Bill for the half year ending at Midsummer 1813, and 2*l.* 8*s.* for his Clothes, were paid, by the Testator, out of his own Pocket ; and, save as before mentioned, she denied that the Testator placed the Plaintiff at School, and paid for his Education, or maintained and supported him : she admitted that she and the Plaintiff's Grandfather paid, equally between them, the Plaintiff's School Bill from Midsummer to Christmas 1813 : the Defendant further said that the Balance of the 190*l.* remaining in the Testator's hands at his death (which amounted to 80*l.* only), was accounted for and paid, to *Walter Williams*, who was the Executor of the Plaintiff's Father, by the Testator's Executors.

It appeared, by the Evidence of two Schoolmasters at whose Schools the Plaintiff had been successively placed, by the Testator, between Midsummer 1810 and Midsummer 1813, that the Testator had, during that time, paid

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for the Plaintiff's Board and Education. On the other hand, Evidence was adduced, on behalf of Mrs. *Parry*, to prove that such payment was made as alleged in her Answer.

Sir *E. Sugden* and Mr. *Spence*, for the Plaintiff :

The question is, whether, in consequence of the Request contained in the Will, Mrs. *Parry* became liable to provide for the Maintenance and Education of the Plaintiff, so as to fit him for a respectable Profession or Employment. With a view to the decision of that question, the Court has a right to look at the Evidence, in order that it may know all the facts which the Testator, himself, was in possession of. There can be no doubt as to the intention ; the only question is whether *the words used [*143] by the Testator, are sufficient to enable the Court to give effect to it. The Testator had placed himself in *loco Parentis* to the Plaintiff. The Testator, in making the Request, joined the Grandfather with his Wife, because the latter might die during the Plaintiff's minority, and then the Grandfather would be enabled to provide for the Plaintiff's Maintenance and Education, out of the Testator's Property. There is but one direction : and, as that was to be fulfilled out of the Testator's Estate after the death of the Wife, there must have been the same intention during the life of the Wife. It was impossible for Mrs. *Parry* to superintend and take care of the Plaintiff's Education, unless the Funds were supplied by her out of the Testator's Property ; and, by paying a Moiety of the Charge for the Plaintiff's Board and Education from Midsummer to Christmas 1813, she acknowledged her liability immediately after the Testator's death.

Mr. *Knight* and Mr. *Duckworth* for the Defendant Mrs. *Parry*.

The Request in the Will is addressed as strongly to the Grandfather as it is to the Wife. The former took nothing under the Will ; and, consequently, no Funds were provided out of which he was to pay for the Maintenance and Education of the Plaintiff. The evidence shows that the Father had left a sum of Money in the hands of the Testator, to provide for the Plaintiff's Education, and that payments were made, by the Testator, for that purpose, out of that Fund ; and that, after the Testator's death, an account was settled, and the Balance was paid over, to Mr. *Williams*, who was the Executor of the Plaintiff's Father, by the Testator's Executors. It is plain therefore that the Fund which *had been provided for [*144] the Plaintiff's Education, was not exhausted at the date of the Testator's Will, as there was a Balance in his hands at his death.

Sir *E. Sugden*, in reply :

The Evidence for the Defendant Mrs. *Parry*, is in our favour. At the date of the Will, the Plaintiff's Father was dead, and the Testator knew it ; for he speaks of him as his *late* Nephew. The Testator also knew that all

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that the Plaintiff had left to fit him for a respectable Profession or Employment, was the small Sum of 80*l.*; and the Plaintiff's Minority lasted till April 1826. If Mr. *Williams* had been a Legatee, there would have been more difficulty in the Case, as the Court would not have known how to apportion the Charge between him and the Testator's Widow.

Mr. *Garratt* appeared for the other Defendants.

The VICE CHANCELLOR:

I doubt whether I am at liberty too look at the Evidence in this Case. The question must I think be decided upon the words of the Will alone. It appears that the Testator, at the time when he made his Will, knew that the Plaintiff's Father was Dead; for he mentions him as the Son of his *late* Nephew. The Testator then made his will, by which he gave his Mansion-house and Estate in the Parish of *Kenchester*, to the Defendant, Mrs. *Parry*, for her life, with Remainder to the Plaintiff for his life, with remainders to the Plaintiff's Sons and Daughters, in Tail, with Remainder over. He then bequeathed his Plate, Household Goods and

Furniture, and other Effects in his Mansion-house, to his Wife, [*145] absolutely: and he also gave to her and *to *C. Bigoe Williams*, the residue of his Real and Personal Estate, in Trust to sell, and, after paying his Funeral and Testamentary Expenses, Debts and Legacies, in Trust for Mrs. *Parry* for her life, and, after her decease, in Trust for the Plaintiff, and to be paid and assigned to him on his attaining Twenty-one: and then the Testator uses these words: "It is my particular Wish and Request that my dear Wife, and *Walter Williams*, Esq., the Grandfather of the said *Walter William Foley*, will superintend and take care of his Education, so as to fit him for any respectable Profession or Employment." If the Testator had said: "I direct that my Great-nephew shall be educated so as to fit him for any respectable Profession or Employment:" that direction would have been taken to be a Gift, to his Great-nephew, of the Funds necessary for his Education, just as much as if the Testator had said, in more extended phraseology, that it was his Wish that his Great-nephew should be educated so as to fit him for any respectable Profession or Employment, and that the Expenses of his Education should be paid out of his Estate. Here the Testator has joined the Request that his Great-nephew should be educated, with the Request that Mrs. *Parry* and Mr. *Williams* should superintend his Education. For it is manifest that what the Testator requires, is the Education of his Great-nephew, as well as the Superintendence of his Widow and Mr. *Williams*. Words of Request, are as much words of Legation, as a direct Gift; and there are several Cases which decide that terms of Request, do amount to a Gift to the Person in whose favour the Request is made. And I am of opin-

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ion that the Request contained in this Will, is a Gift, to the Plaintiff, of the Expenses of his Education : and Education must include Maintenance.

*Declare that, according to the true construction of the Will, [*146] the Plaintiff was entitled to be maintained and educated, from the decease of the Testator, up to the time when he attained Twenty-one, in such a manner as to fit him for any respectable Profession or Employment, out of the Rents, Profits and Annual Income, of the Testator's Real and Personal Estates, which accrued after his death, regard being had to the Fortune given to him by the Will, and which he is entitled to, expectant on the death of Mrs. *Parry*. Refer it, to the *Master*, to inquire what Sums have been properly expended and incurred, since the Testator's decease, by or for the Plaintiff, in such Maintenance and Education, and in fitting him for the Profession of Solicitor, regard being had to the Fortune given to him as aforesaid, and, in making such inquiry Mrs. *Parry* is to be allowed the Sum of 80*l.* paid, by her, to the Plaintiff's Grandfather, on the 28th of May 1814*.

*MANNERS v. BRYAN.

[*147]

1832 : 19th & 21st June.—*Practice*.

In computing the eight days within which Cause must be shown against confirming a Report absolutely, the day on which the Order *Nisi*, was served, must be reckoned : but, if the eighth day is a holiday, one day more will be allowed. But see the Note at the end of this Case.

By the Decree in this Cause, dated the 3d of March 1830, it was referred to the *Master* to inquire whether the Defendant, *Bryan*, was, at the date of the Agreement in the Pleadings mentioned, able to make a valid Sale of the Portion of the Fund coming to him in right of his Wife. On the 12th of March 1832, the *Master* reported in the negative : and, on the 13th, it was ordered that the Report should be confirmed, unless the Defendant should, within eight days after Notice of that Order, show good cause to the contrary. On the 14th, the Plaintiff's Solicitor served the Defendant's Clerk in Court with Notice of the Order, in the usual manner. On the 21st, which was a general Fast day, the Offices were closed. On the 22d,

* Affirmed, by the *Lord Chancellor*, on the 25th of November 1833. The Judgment proceeded upon the Clause containing the Request, taken in connection with the general contents of the Will : and his Lordship observed that the Testator comprehended the Grandfather in the Request, with a view to obtaining, for his Widow, the assistance of that Male Relative of the Plaintiff, in performing those offices, the expense of which the Widow was to defray out of the Legacy to her. See *Benson v. Whittam*, ante, p. 22.

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the Order *Nisi* was made absolute, on the Registrar's Certificate of no cause having been shown. On the same day, the Defendant, having filed Exceptions to the Report, obtained an Order, by Petition at the *Rolls*, that the Exceptions might be set down for Argument: but that Order was not passed and entered till the 23d.

A motion was now made, on behalf of the Defendant, to discharge the Order confirming the Report absolutely, for irregularity.

The Motion was supported by an Affidavit, in which it was stated that the Order for setting down the Exceptions, was passed and entered on the 22d of March.

Mr. *Knight* and Mr. *Koe*, in support of the Motion, said that [*148] the 21st of March, having been a holiday, was not to be reckoned as one of the eight days within which the Defendant was to show Cause against confirming the Report absolutely: and that the Order for setting down the Exceptions, having been passed and entered on the 22d of March, the Order for confirming the Report absolutely, was irregular.—*Bullock v. Edington* (a).

Mr. *Pepys* and Mr. *Ellison* opposed the Motion.

The Entering Clerk's Day-Book having been produced in Court, it appeared that the Order for setting down the Exceptions, was not brought to him to be passed and entered, till the *twenty-third* of March.

The *Vice Chancellor* said that, as the Fast-day was the last of the eight days, it was not to be reckoned; but, if it had been one of the intermediate days, it ought to have been counted: that the Registrar had informed him that it was the Practice to reckon the day on which the Notice of the Order for confirming the Report *Nisi*, was served, as one of the eight days; and that he should not disturb that Practice: but that, as the Decision in *Bullock v. Edington*, afforded a ground on which the Defendant might hope to succeed, he should refuse the Motion without Costs (b).

(a) *Ante*, vol. i. p. 481.

(b) A Motion to discharge the above Order and also the Order confirming the Report absolutely, was refused, by the *Lord Chancellor*, on the 14th of February 1833. His Lordship stated that the Registrar had informed him that the time for showing cause against confirming the Report absolutely, expired on the 21st of March, though it was a holiday, but that no Certificate would have been granted till the Morning of the 22d.

1833.—Gillibrand v. Goold.

GILLIBRAND v. GOOLD.

[*149]

1833: 10th December.—*Portions.*

Where, under a Settlement, a Sum of Money is to be raised, out of Real Estates, for the Portions of younger Children, and some of the Portions have become payable, the Court will raise the whole Sum at once, although some of the Children have not acquired vested Interests.

By Indentures of Lease and Release, bearing date the 10th and 11th days of August 1801, executed in pursuance of Articles made on the Marriage of *Thomas Gillibrand*, Esq. and Miss *Marcella Goold* in the preceding month of March, certain Estates (consisting of a Moiety of a Manor, and the Messuages, Rents and Hereditaments therein described) were conveyed to the use of *Thomas Gillibrand*, for life, with remainder, (subject to a Limitation to Trustees to preserve Contingent Remainders, and to a Rent-charge of 500*l.*, to Mrs. *Gillibrand*, during her life, in case she should survive the said *Thomas Gillibrand*) to *S. H. Fazakerley* and *G. Goold* (of whom the Defendant *Goold* was the survivor) for 500 years, upon the Trusts after-mentioned, with remainder to the first and other sons of Mr. and Mrs. *Gillibrand*, in Tail Male. The Trusts of the Term of 500 years, after providing for better securing the Rent-charge of 500*l.* out of the Rents or by Sale or Mortgage, were declared as follows: "And, subject to the aforesaid Trusts and without prejudice thereto, upon this further trust and confidence that, in case there shall be one or more Child or Children of the said *Thomas Gillibrand* by the said *Marcella Gillibrand* (other than and except an eldest or only Son) then and in such case, they the said *S. H. Fazakerley* and *G. Goold*, or the Survivor of them, or the Executors, Administrators or Assigns of *such survivor, do and shall, af- [*150]

ter the decease of the said *Thomas Gillibrand*, (or in his lifetime, if he shall so direct, by any Deed or Instrument in writing, signed by him in the presence of and attested by two or more credible Witnesses) by Mortgage, Sale, or any other disposition of the said Manor, Capital and other Messuages, Rents, Hereditaments and Premises comprised in the said Term of 500 years, or any of them, or any part thereof, for all or any part of the same Term, or by and out of the Rents, Issues and Profits thereof respectively (but subject to the said annual Sum or yearly Rent-charge of 500*l.* and the Powers and Remedies hereinbefore contained for compelling payment thereof) levy and raise, for the Portion or Portions of all and every

* *Ex Relatione.* See *Fazakerley v. Ford*, ante. vol. iv. p. 390. The names of *Gillibrand* and *Fazakerley* are mis-spelled in that Case.

1833.—*Gillibrand v. Gould.*

such Child or Children (other than and except an eldest or only Son) such Sum or Sums of Money as is or are hereinafter mentioned, (that is to say) if there shall be but one such Child, whether a Son or Daughter, the Sum of 6,000*l.* of like lawful Money, for the Portion of such one Child, and, if there shall be two such Children and no more, be the same Sons or Daughters, or a Son and a Daughter, then the Sum of 8,000*l.* of like lawful Money, for the Portions of such two children, and, if there shall be three or more such younger Children, be the same Sons or Daughters, or be there both Sons and Daughters, then the Sum of 10,000*l.* of like lawful Money, for the Portions of such three or more Children; the said several Sums of 6,000*l.*, 8,000*l.*, or 10,000*l.*, as the case may happen, to become and be an Interest vested and transmissible, in such Child or Children respectively who shall be a Son or Sons, at his or their respective age or ages of 21 years, and in such of them as shall be a Daughter or Daughters, at her or their re-
 ['151] spective age or ages of 21 years, or day or respective days of Marriage, which shall first happen, and to be paid to him, her or them respectively, on or at the same age, day or time, if the same shall happen after the decease of the said *Thomas Gillibrand*, but, if the same shall happen in his lifetime, then immediately after his decease."

Then followed Provisoes of Survivorship and Accruer in case any Son or Sons should die or become an eldest Son, under 21, or any Daughter or Daughters should die under 21, without having been married, but no such one, two, three or more Children were to be entitled to more than the Sums above mentioned.

" Provided also, and it is hereby further agreed and declared, between and by the Parties to these Presents, that it shall and may be lawful, to and for the said *S. H. Fazakerley* and *G. Gould*, and the Survivor of them, and the Executors, Administrators and Assigns of such Survivor, at any time or times after the decease of the said *Thomas Gillibrand* (or in his lifetime, in case he shall so direct by any Writing or Writings under his hand) to levy and raise, by the ways and means aforesaid (but subject and without prejudice as hereinbefore is mentioned) a part of the Portion or Portions intended to be hereby provided for such younger Sons or Daughters as aforesaid, not exceeding, in the whole, for any one such Child, one Moiety or equal half Part or Share of his, her or their expectant Portion, and to pay and apply, the Moiety so to be raised, for the preferment and advancement or benefit of such Child, in such manner as the said *S. H. Fazakerley* and *G. Gould*, or the Survivor of them, or Executors, Administrators or Assigns of such Survivor, shall, in their or his discre-
 ['152] tion, think fit, notwithstanding the Portion or Portions of such Child or Children shall not then have become vested or payable: and upon this further Trust, that they said *S. H. Fazakerley* and *G. Gould*,

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and the Survivor of them, and the Executors, Administrators and Assigns of such Survivor, do and shall, after the decease of the said *Thomas Gillibrand* (but nevertheless subject and without prejudice as aforesaid) by and out of the Annual Rents, Issues and Profits of the Moiety of the said Manor, Rents, Hereditaments and Premises comprised in the said Term of 500 years, or any Part or Parts thereof, levy and raise, for the Maintenance and Education of the Child and Children, for the time being, of the said *Thomas Gillibrand* by the said *Marcella Gillibrand*, for whome a Portion or Portions is or are intended to be hereby provided as aforesaid, in the meantime and until his, her or their Portion or respective Portions shall become payable, such yearly Sum or Sums of Money as the said *Thomas Gillibrand*, at any time during his life, by any Writing with or without Power of Revocation, to be sealed and delivered by him in the presence of and attested by two or more credible Witnesses, or by his last Will and Testament in writing, to be signed by him in the presence of and attested by three or more credible Witnesses, shall direct or appoint, not exceeding what the Interest of the Portion or Portions intended to be hereby provided for such Child or Children respectively, would amount to, at the rate of 4*l.* for every 100*l.* by the year, were he, she or they then entitled thereto, and, in default of such direction or appointment, then such yearly Sum or Sums of Money, not exceeding the amount of such Interest as aforesaid, as the said *S. H. Fazakerly* and *G. Goold*, or the Survivor of them, or the Executors, Administrators or Assigns of such Survivor, shall [*153] think fit, the said yearly Sum or Sums of Money for Maintenance, to be free and clear of and from all deductions for Taxes or otherwise, and to be raised and paid by four equal Quarterly Payments, on or at the four Feasts, or days of payment hereinbefore mentioned, and the first of the same Quartley Payments to be made on such of the said days as shall happen next after the decease of the said *Thomas Gillibrand*."

It was then provided that the Trustees should not mortgage any part of the Premises, until some one of the said Portions should become payable, and that the Rents or so much as should remain after Payment of the said annual Sums for Maintenance, should, until some one of such Portions should become payable, be received by the Person or Persons entitled in Remainder, expectant on the Term. There was then a Proviso declaring that any Sum advanced, by *Thos. Gillibrand*, to any of his younger Children, should go in or towards satisfaction of his or her Portion, unless he should declare the contrary; and, lastly, a Proviso for cesser of the Term.

In December 1828, Mr. *Gillibrand* died, leaving eight Children surviving him. The Defendant *Fazakerley*, who had assumed that name, was the second Son of the Marriage, but he had then become the eldest Son and Tenant in Tail Male in possession under the Settlement. The Plaintiffs

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were the other Sons and Daughters : four of them had attained 21, and three were under that age. The object of the Bill was to have their Portions raised.

Sir *E. Sugden* and Mr. *Parry*, for the Plaintiffs, submitted that the whole 10,000*l.* ought now to be raised.

[*154] *Mr. *Walker*, for the Defendant *Fazakerley* :

My Client is willing to pay the whole Sum, if he can safely do so ; but I submit that only the Share of the Children who have attained 21, can be raised. It is a question in which almost every landed Proprietor in the kingdom, as well as younger Children whose Portions are charged on Lands, are interested. The object, in all these Cases, is that the Children shall have the Security of the Estate. The Case of *Wynter v. Bold* (a) is an Authority that the whole need not be raised at once : and *Dickinson v. Dickinson* (b), is an Authority that, where there is no direction to appropriate the Money, it cannot be raised before it is payable, and that the Land is not discharged even by an Investment under a Decree.

[The *Vice-Chancellor* :—Suppose there are ten younger Children, are there to be ten Mortgages ;]

Mr. *Walker* :—No one can deny the weight of that objection to the construction contended for, but the Answer to it that, if such were the true construction of the Settlement, it is immaterial, and the inconvenience is trifling, when it is considered that the Remainder-man can always relieve himself by payment. If 10,000*l.* can be raised now, the same Sum might, and, if the true construction is that one Mortgage only is to be made, must have been raised, had one Child required it on attaining 21. Are the other six to be subject to the fluctuation in the Value of the Securities, and to the danger from insolvency of Trustees, and other causes of losing their Property ?

[*155] If more than one Mortgage is authorized to be made, why are three Children now under age, to be subjected to these chances, and to be deprived of the Security of this ample Estate, and to take a less rate of Interest than they are now receiving ? Besides, it will violate another principle, namely, that Portions are not to be raised out of Real Estates, unless they become payable. Suppose one Child had attained 21 and required its Portion, and the other Children had died without becoming entitled ; 10,000*l.* would have been raised, although 6,000*l.* only would have been wanted and the 4,000*l.* might have been left ; and, if 6,000*l.* had been raised, how is that Sum and what remains to be raised, to be divided amongst the Children as they become entitled ; and, if the Sum raised is improperly spent, how is the loss to be borne ? In this Case, the Estate is the Security

(a) 1 Sim. & Stu. 507.

(b) 3 Bro. C. C. 19.

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contemplated until Payment. There is no Power to the Trustees to give Receipts and no direction to appropriate the Money. The Advancement Clause, as well as other Clauses, contemplate that part only may be raised at one time. The Maintenance Clause directs a Portion of the Rents to be applied in Maintenance, until the Portions become payable. The succeeding Clause, that no Mortgage is to be made until some one of the Portions becomes payable, does not afford any inference that one Mortgage only is to be made. It was intended to guard against any Sum being raised out of the Term, while it was in Reversion or Remainder.

The VICE-CHANCELLOR :

The whole 10,000*l.*, as I understand, has become raisable. In this Settlement there is a Clause that no Mortgage is to be made until some one of the Portions shall become payable. The whole 10,000*l.* must therefore *be raised at once. It is said that some of the Shares [*156] may become diminished in Amount : the Answer to that is that the Court considers the Investment in the Three per Cent. Consols, as equivalent to Payment. If there is any rise in the Funds, the Children under age will have the benefit of it.

NICHOLS v. ROE.

1833: 5th December. 1834: 11th January.—*Arbitration.—Award.—Jurisdiction.*

Where it is one of the Terms of an Agreement to refer disputes to Arbitration, that the submission may be made a Rule of a Court of Law, on the application of either party, but that has not been done: Held, on Demurrer, that this Court has jurisdiction to relieve against the award. And the Court having once exercised its jurisdiction over the Award, will retain it, although, on the coming in of the Answer, it appears that the submission had then been made a Rule of a Court of Law, by the Defendant.

THE Defendant had occupied a Farm, as Tenant to the Plaintiff, from Michaelmas 1823 to Michaelmas 1832; and being, on the 11th of September in that year, indebted to the Plaintiff, in 610*l.* for Rent of the Farm, he, for securing such Debt, assigned, to the Plaintiff, his Household Furniture, Stock, Crops and other Effects on the Farm. The Plaintiff afterwards sold the Articles so assigned to him, and applied the Proceeds, which, it was alleged, were more than sufficient to pay the Debt, to his own use. Disputes and differences having arisen, between the Parties, as to the value of the Articles sold, and also as to the management and occupation of the Farm during the Defendant's tenancy, by Articles of Agreement dated the 12th of August 1833, the Parties agreed to refer such Disputes and Differences, and all other Controversies then existing between them, to the determination of two Persons *therein named, provided they made [*157]

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their Award within a month from the date of the Articles of Agreement ; and, in case the Arbitrators should not agree upon their Award, within that time, then to the determination of an Umpire to be appointed by them, provided he should make his Award, in writing, under his Hand and Seal, within a month from the time of the reference to him : and it was further agreed that no Action, Suit, or proceeding at Law, or in Equity, should be commenced or prosecuted, by either of the Parties to the Agreement, against the other of them, in relation to the Matters and Things aforesaid, or any of them, until the Award or Umpirage should have been made and delivered, or the Arbitrators, or their Umpire should have declined or neglected to make their, or his Award or Umpirage within the respective times thereby limited for that purpose. And it was further agreed that the said reference or submission, should or might be made a Rule of the Court of King's Bench, on the application of either of the Parties thereto, and that no Action or Suit at Law or in Equity, should be commenced or prosecuted against the Arbitrators or Umpire, concerning their or his Award or determination, after the same should have been so made as aforesaid, nor to impeach the said Award or Umpirage, unless some collusion or other Fraud should be discovered therein. And each of the Parties bound himself to the other, in 500*l.*, for the due performance of the Award or Umpirage on his part : and it was further agreed that all Fees and Monies which the Arbitrators or Umpire should think proper to give, to any Counsel or others, for advice or otherwise, relative to the Premises, and all other reasonable Expenses attending the Award or Umpirage, and also the Costs of preparing the [*158] Articles of Agreement, and of all Matters and Things in relation to the reference, should abide the event of the Award, and be borne and paid, by the Party or Parties, and at such time as the same should, thereby, be directed to be paid and borne.

The Arbitrators took upon themselves the reference, but not agreeing in their Award, they, in pursuance of the power given to them by the Agreement, appointed an Umpire, who made his Award, by a Deed-poll, dated the 12th October 1833, and thereby directed that the Plaintiff should, on the 1st of November then next, pay, to the Defendant, the Sum of 208*l.* 10*s.*, and that the same should be received, by the Defendant, in full satisfaction and discharge of and for all the Matters in difference ; and that all such Fees, Monies, Expenses and Costs as, by the Articles of Agreement, it was agreed should abide the event of the Award, should be paid at the time before appointed for payment of the 208*l.* 10*s.*

The Bill, which was filed on the 4th of November 1833, stated that the Umpire had not, by his Award, made a full and final arbitrament or determination of all the Matters referred to him, and that, thereby, the Plaintiff had not all the advantages, which, under the Articles of Agreement, he was

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entitled to, but that the Award was defective, and ought to be set aside. The Bill charged that the Cost and Expenses which the Plaintiff had been put to, relating to the Articles of Agreement and the Award, amounted to a very considerable Sum; and that the Defendant had not, at the time of filing the Bill, made, but that he forthwith intended to make, the submission to refer to Arbitration *contained in the Articles of [*159] Agreement, a Rule of the Court of King's Bench, or of one of the other Courts of Record, under the Statute in that case made and provided, and to take proceedings upon the Rule, when obtained, against the Plaintiff, or otherwise to bring an Action against him, in one of the Courts of Law, upon the Award.

The Bill prayed that the Award might be declared void, and that the Defendant might be decreed to deliver it up to be cancelled, together with the Articles of Agreement, and that, in the meantime, he might be restrained from making the submission to refer to Arbitration, contained in the Articles of Agreement, a Rule of the Court of King's Bench, or of any other Court of Record, and from bringing any Action at Law, against the Plaintiff, upon the Articles of Agreement and Award, or either of them; or that, in case, after having been served with a *Subpœna* to appear and answer the Bill, and before the Injunction should be granted, the Defendant should proceed to make the submission a Rule of Court, then that he might be perpetually restrained from taking any proceedings upon the Rule so obtained, and from commencing or continuing any Action or Suit, at Law or in Equity, upon the Articles of Agreement and Award, or either of them.

The Defendant, on the 18th of November 1833, put in a general Demurrer*.

* By 9 & 10 Will. 3, c. 15, s. 1, it is enacted that it shall be lawful for all Merchants and Traders, and others desiring to end any Controversy, Suit or Quarrel, for which there is no other remedy but by Personal Action or Suit in Equity, by Arbitration, to agree that their submission of their Suit to the Award or Umpirage of any Person or Persons should be made a Rule of any of His Majesty's Courts of Record, which the Parties shall choose, and to insert such their Agreement in their submission, or the condition of the Bond or Promise, whereby they oblige themselves respectively to submit to the Award or Umpirage of any Person or Persons, which Agreement being so made and inserted in their submission or promise or condition of their respective Bonds, shall or may, upon producing an Affidavit thereof made by the Witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a Rule, and reading and filing the said Affidavit in Court, be entered of Record in such Court, and a Rule shall thereupon, be made by the said Court, that the Parties shall submit to, and finally be concluded by the Arbitration Umpirage which shall be made concerning them by the Arbitrators or Umpire, pursuant to such submission, and in case of disobedience to such Arbitration or Umpirage, the Party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the Penalties of contemning a Rule of Court, when he is a Suitor or Defendant in such Court, and the Court, on Motion, shall issue Process accordingly, which Process shall not be stopped or delayed in its execution,

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- [*160] *Mr. *Pepys* and Mr. *Purvis*, for the Demurrer, relied on *Davis v. Getty* (a), and contended, upon the authority of that Case,
 [*161] *that the Parties having agreed that the Submission should be made a Rule of the Court of King's Bench, that Court alone had jurisdiction to set aside the Award.

Sir *E. Sugden* and Mr. *Webster* in support of the Bill :

The 9 & 10 Will. 3, c. 15, does not take away the jurisdiction of a Court of Equity to set aside an Award, where it is void on the face of it. That Statute does not make it imperative on the Parties to make the Submission a Rule of Court. They have an option to do so or not. The *Master of the Rolls* is wrong therefore in saying that the Parties must take advantage of the Act, and that the Party complaining of the Award, is bound to make the Submission a Rule of Court, if he wishes to have the Award set aside. Suppose a Party considers himself to be aggrieved by an Award, and that the time allowed, by the Statute, for setting it aside, has elapsed, he must, if the *Master of the Rolls* be correct, go and make the Submission a Rule of Court, and, by that very act, he excludes himself from all remedy ; for it is too late to apply to have the Award set aside ; and, after the Submission has been made a Rule of one Court, no other Court can have jurisdiction. *Lord Lonsdale v. Littledale* (b) ; *Nichols v. Chalie* (c).

- [*162] *The decision in *Gwinett v. Bannister* (d) is founded, expressly, on the ground of the Submission having been made a Rule of Court. In *Steff v. Andrews* (e) *The Vice-Chancellor* over-ruled the Plea because it stated no new Matter. One of the Statements in the Plea, was the Agreement of the Parties that the Submission should be made a Rule of the Court of Common Pleas. Sir *Thomas Plumer* says : “ A mere submission to make an Award a Rule of Court, is unimportant, unless it actually was made a Rule of Court.” The whole point depends upon the opinion of the *Master of the Rolls*. Unless the Statute clearly excludes the jurisdiction of this Court, it is not to be considered as taken away. *Street v. Rigby* (f).

by any Order, Rule, Command, or Process of any other Court, either of Law or Equity, unless it shall be made appear, on oath, to such Court, that the Arbitrators or Umpire misbehaved themselves, and that such Award, Arbitration or Umpirage, was procured by Corruption or other undue means.

By Section 2, it is further enacted that any Arbitration or Umpirage procured by Corruption, or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, so as complaint, of such Corruption or undue practice be made in the Court where the Rule is made for submission to such Arbitration or Umpirage, before the last day of the next Term after such Arbitration or Umpirage made and published to the Parties.

(a) 1 Sim. & Stu. 411. See also *Dawson v. Sadler*, ibid. 537.

(b) 2 Ves. 451. (c) 14 Ves. 265. (d) 14 Ves. 530. (e) 2 Madd. 6.

(f) 6 Ves. 815.

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The Agreement of the Parties cannot have the effect of ousting the jurisdiction.

[The *Vice-Chancellor* :—According to the decision of *The Master of the Rolls* in *Davis v. Getty*, *The Lord Chancellor* had no jurisdiction to set aside the Award in *Ward v. Perirm (g)*.]

Mr. *Purvis* in reply :

This is not a question upon an Agreement between the Parties ousting the jurisdiction of the Court, but whether one of the Parties is to have the power of transferring the jurisdiction from a Court which both have chosen. The Statute gives the Parties an option as to the Court: the words are “any of His Majesty’s Courts of Record which the Parties shall choose:” but, when the selection has been made of a particular Court, the “jurisdiction is confined to that Court, and from it Process is to issue [*163] sue, and the Process is not to be delayed, “by any Order, Rule, Command, or Process of any other Court either of Law or Equity.” The Statute was passed for the final determination of Controversies; and all the Provisions are made with that view. If the jurisdiction of other Courts be not excluded, the Statute would not be an advantage to the Parties, but the reverse.*

The VICE-CHANCELLOR :

This is a Case of great importance, I shall not decide it without great consideration.

The VICE-CHANCELLOR :

It is clear, from the case of *Brown v. Brown (h)* that, before the Statute, where an Agreement to refer had been made a Rule of a Court of Law, the Court of Chancery would entertain jurisdiction over the Award. In that case *The Lord Keeper* dismissed the Bill; not because he had no jurisdiction to entertain it, for he did entertain it, and, after long debate, as *Vernon* says, dismissed the Bill for want of merits. The Statute was passed in 1698; and it is equally clear that, after the Statute, where the Agreement to refer is made a Rule of a Court of Law, in an Action depending in it, this Court will entertain jurisdiction over the Award. This appears from *Lord Lonsdale v. Littledale (i)*, which was decided, by Lord *Rosslyn*, in 1794; and the language used by Lord *Eldon*, in *Nichols v. Chalie (k)*, confirms this proposition. In *Ward v. Periam (l)*, the “Submission [*164] had been made a Rule of the Court of King’s Bench, on the Plaintiff’s own application. Yet, on the Plaintiff’s Bill, Lord Chancellor *Macclesfield* set aside the Award with] Costs. Lord *Hardwicke*, in *Chicot v.*

* The Arguments are reported *ex relatione*.

(g) 2 Eq. Abr. 91, and 1 Turn. & Russ. 131, note.

(h) 1 Vern. 157.

(i) 2 Ves. jun. 451.

(k) 14 Ves. 268.

(l) In Note to *Auriol v. Smith*, 1 Turn. & Russ. 131.

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Laquesne (m) comments on this decision, and says that Lord *Macclesfield* considered the Case the same as if a Court of Common Law had refused to exercise its jurisdiction. But the Defendant's argument is that the mere Agreement to refer and make the Submission a Rule of a Court of Law, takes away the jurisdiction of the Court of Chancery. Lord *Hardwicke*, in the Case which I have just mentioned, expressly says that the Decree in *Ward v. Periam*, was very just, which it could not have been, if the Court had no jurisdiction. In *Spettigue v. Carpenter* (n) after the Submission had been a Rule of the Court of Chancery, Lord *Talbot*, on Bill filed, set aside an Award. He, therefore, must have held that the general jurisdiction by Bill, remained, notwithstanding the particular jurisdiction by process of Contempt given by the Statute. What was done in *Kampshire v. Young* (o), seems to show that the Court has jurisdiction, although not only had the Submission been made a Rule of the Court of King's Bench, but an Attachment had issued for not obeying it. In *Hutchinson v. Hodgson* (p), (an ill-reported Case), the Submission had been made a Rule of the Court of King's Bench. In *Nichols v. Chalie* (q) the reference was made under the Statute, and the Submission had been made an Order of the Court of King's Bench, and it is, therefore, with reference to that circumstance, ['165] and upon the supposition that the Court of King's Bench would act, that Lord *Eldon* must be understood to say: "If the reference is within the Statute, the Legislature has declared that a Court of Equity shall have nothing to do with it." In *Gwinett v. Bannister* (r) also, the reference was under the Statute, and the Submission had been made a Rule of the Court of King's Bench, and the common Injunction having been obtained, Lord *Eldon* dissolved it, on the ground that this Court had no jurisdiction to set aside the Award.

In *Steff v. Andrews* (s) Sir *T. Plumer* says: "A mere submission to make an Award a Rule of Court, is unimportant, unless it actually was made a Rule of Court. If made a Rule of Court, this Court could not act: the jurisdiction would be transferred to the Court in which the Submission was made a Rule; but, if the Submission is not acted upon, no other Court acquires jurisdiction." After this came the Case of *Davis v. Getty* (t).—There the Submission was not made a Rule of Court, and His Honor, the present *Master of the Rolls*, held he had no jurisdiction. He, however, merely reasoned on the Statute, and did not cite any authority. In the subsequent Case of *Dawson v. Sadler* (u) the Submission was made a Rule of the Court of King's Bench, before the Motion was made; and, therefore,

(m) 2 Vez. 317.

(p) 2 Anstr. 361.

(s) 2 Madd. 10.

(n) 3 P. W. 361.

(q) 14 Ves. 265.

(t) 1 Sim. & Sta. 411.

(o) 2 Atk. 155.

(r) 14 Ves. 530.

(u) Ibid. 537.

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His *Honor* might well say, after *Gwinett v. Bannister* had been cited by Counsel, that the authority referred to, had, in effect, determined the question, and, consistently with prior decision, refuse the motion.

"The question, therefore, is, which of the two learned Judges [*166] who preceded me, is right. To me it appears that, upon the words of the Statute, the original, inherent jurisdiction of this Court, is not taken away, except where the Submission has been made a Rule of a Court of Law; and the authorities show that, even in that case, it is not, of necessity taken away, but will remain, in case the Court of Law will not, or cannot act upon the Award. I am not aware of any authority upon which the decision in *Davis v. Getty* can be supported. But I do see authority which shows that the original jurisdiction of this Court over Awards, does remain, even in Cases where the Submission has been made a Rule of Court under the Statute. In this Case, I cannot assume that the Court of King's Bench will, after the Submission has been made a Rule of Court, act upon the Award. In my opinion, therefore, the Demurrer must be overruled. But, as I have the misfortune to differ from *The Master of the Rolls*, I shall be most satisfied if the Judgment of a higher tribunal will put the question at rest.

On the 16th November 1833, the Defendant caused the Submission to Arbitration to be made a Rule of the Court of King's Bench. On the 17th of January following, the Plaintiff obtained the common Injunction for want of an Answer: and, on the 13th February, the Answer was filed, admitting the Agreement and the Award, and stating that, in Michaelmas Term then last, the Defendant had caused the Submission to be made a Rule of the Court of King's Bench, according to the Statute, and submitting that, on that account, this Court had no jurisdiction, on the [*167] ground stated in the Bill, if any such ground there were, to set aside the Award, but that every matter and thing relating to the Arbitration and Award, was then properly cognizable in the Court of King's Bench, and in that Court only: that the Award was fair, full, and complete, and that the Plaintiff had not stated, by his Bill, any of the Matters referred to Arbitration as aforesaid, as to which he alleged that the Umpire had not made a full Arbitrament: that the Plaintiff had all the advantages under the Articles of Agreement, which he was in justice and equity entitled to, and that the award was not defective, and ought not to be set aside, even if this Court had jurisdiction so to do; and that the Defendant intended forthwith to take Proceedings, against the Plaintiff, on the Rule, or to bring an Action, against him, on the Award.

The Defendant, having, on the coming in of his Answer, obtained an Or-

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der *Nisi* to dissolve the Injunction, Sir *E. Sugden* and Mr. *Webster*, for the Plaintiff, now showed Cause against dissolving the Injunction. They said that the point decided on the argument of the Demurrer, was that the ancient jurisdiction of this Court remained : that the equity on which the Bill was founded, was an imperfect Award, which was the question to be decided at the hearing of the Cause ; and, as the Plaintiff had a right to have the validity of the Award tried in this Court, the Injunction must be continued.

The *Solicitor-General* (Sir *C. Pepys*) and Mr. *Purvis* for the Defendant, argued that the ground on which the Demurrer was allowed, was that no other Court *had jurisdiction over the Award ; that the Submission had been since made a Rule of the Court of King's Bench, and, consequently, the jurisdiction of this Court was taken away by the Statute, and the Court of King's Bench alone now had jurisdiction over the Award : that by the Motion, the Court was asked not only to exercise its own jurisdiction, but to take away the jurisdiction of the Court of King's Bench, in which Court the Parties had contracted that the question should be decided : that no Case was made for continuing the Injunction : that the Umpire had awarded a certain Sum to be paid, to the Defendant, in full satisfaction of all the matters in difference ; which was final : that the Bill did not allege on what ground the Award was not final, but contained a mere, general allegation to that effect : that there was no Equity whatever to prevent the Defendant from receiving the Sum awarded to him ; and, consequently, he ought to be left to his legal remedy to recover it.

The VICE-CHANCELLOR :

The Court has decided, on the facts appearing by the Bill, that the Plaintiff has an Equity ; and the Answer does not displace that Equity. It does, indeed, deny that the Award is not final, but it leaves the facts of the Case just as they were when the Demurrer was argued.

In *Ward v. Periam*, it was held that, though a Court of Law may have acquired jurisdiction over an Award, yet if that Court subsequently refused to act, or cannot act upon the Award, the ancient jurisdiction of this Court is revived. *Non Constat* that the Court of King's Bench will [*169] act on this Award. Besides, in the present *Case, this Court acquired and exercised jurisdiction prior to the time when the Submission was made a Rule of a Court of Law ; and, where a Court once acquires a jurisdiction, it retains it.

A judge is bound to take notice of a prior Order made in the same Cause. On the Argument of the Demurrer, I decided that the Plaintiff had an Equity and I am bound by the Order which I then made ; and must therefore hold that there is an Equity to set aside this Award.

Motion to dissolve the Injunction refused.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

*KEVERN v. WILLIAMS.

[*171]

1832: 13th January.—*Will.—Construction.—Remoteness.*

Testator bequeathed his Residuary Estate to Trustees, in Trust for his Wife for life, and, after her decease: "to preserve the then remaining part of my Estate for the Grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of 25 years; and when the youngest shall have attained the age of 25 years, and he or she shall have received their final Dividend or Share of my Estate, the Trust shall cease."—Testator left his Widow and Brother, surviving. Eight Grandchildren of the Brother were in existence at the Widow's death, and several were born afterwards. Held that the Bequest was not void for remoteness; but that those only of the Grandchildren who were in existence at the Widow's decease, were entitled to share in the Testator's Residuary Estate.

WILLIAM KEVERN, by his Will, dated the 16th of January 1798, gave to *Hannah Pope*, his Apprentice, when she arrived at the age of 25 years, (if she should so long live), 100*l.*, for payment whereof he bound his Real and Personal Estate, and to each of his Executors, five Guineas, and then disposed of his Residuary Estate as follows:—"All the rest and residue of my Testamentary Estate, whether Lands, Tenements, Hereditaments, Monies, Goods, Chattels or other *Effects, of what nature or kind [*172] soever, I give and devise the same unto my Brother, *Charles Kevern*, *Samuel Sims* and *John Blake*, and I do hereby constitute and appoint the said *Charles Kevern*, *Samuel Sims* and *John Blake* to be joint Executors of this my last Will and Testament, in Trust, nevertheless, that the whole of my said Estate shall be applied towards the support and maintenance of my Wife, *Susannah Kevern*, during her natural Life, at the discretion of my said Executors; and I do hereby authorize and empower them, their Executors and Administrators, for that purpose, to sell, alienate and confirm, or otherwise dispose of any or all of my said Real and Personal Estate, to the best advantage as to them may seem meet, and, after the de-

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cease of my said Wife, to preserve the then remaining part of my Estate, or the neat Produce thereof, to and for the use and benefit of the Grandchildren of my said Brother *Charles Kevern*, to be by them and each of them received in equal proportion to the Effects in hand and remaining, when they and each of them shall severally attain the age of Twenty-five years, and not before; and, when the youngest thereof shall have attained the full age of Twenty-five years as aforesaid, and he or she shall have received their final Dividend or Share of my said Estate, the Trust shall then cease and determine." The Testator died in March 1798, and his Widow *Susannah Kevern* died in April, in the same year.

The Bill alleged that there were living, at the deaths of the Testator and his Widow, seven Grandchildren of *Charles Kevern* the Testator's Brother; that *Mary Ann Kevern*, one of them, died in 1806, and that the Plaintiff was her Administrator; that several other Grandchildren of the [*173] Testator's Brother (who were Defendants to the Bill), were born after the Defendant, *Peter Mounier*, who was the eldest Grandchild, attained Twenty-five; that the Testator's Brother died in May 1815; that such of his Grandchildren as were born after the Testator's death, or, at all events, after *P. Mounier* attained Twenty-five, did not take any Share or Interest in the Testator's Personal Estate; but that the Plaintiff was advised that, according to the true construction of the Will, the seven Grandchildren of the Testator's Brother living at the Testator's death, became severally entitled, immediately upon the death of the Testator or his Widow, to Vested Interests in one Seventh part of the Testator's residuary Personal Estate, payable on their respectively attaining the age of Twenty-five years.

The Bill prayed that the Testator's Personal Estate might be applied in a due course of administration, and the clear Residue thereof ascertained and divided into Seven equal Parts, and that one Seventh Part thereof might be paid to the Plaintiff, as the Administrator of *Mary Ann Kevern*.

The Decree directed the *Master* to inquire and state what Grandchildren the Testator's Brother had, as well such as were living at the deaths of the Testator and his Widow, as those who had been born since the decease of the Survivor of them, and when they were respectively born, and which of them were living when *Peter Mounier* attained his age of Twenty-five years, and which of them had been born since, and whether any and which of them had attained Twenty-five, and whether and which of them were dead, and at what times they died respectively, and whether before or after [*174] *P. Mounier* attained Twenty-five, and who were their Representatives, and also when the Testator's Widow died, and who were the Next of Kin of the Testator living at his decease, and whether any and which of them were since dead, and who were their Representatives.

The *Master* found that seven Grandchildren of *Charles Kevern*, (two of

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whom were *Peter Mounier* and *Mary Ann Kevern*.) were living at the respective deaths of the Testator and his Widow; that 15 others were born afterwards, and three more after the 19th of January 1813, on which day *P. Mounier*, the eldest Grandchild, attained Twenty-five, at which time there were 17 Grandchildren living; that *P. Mounier* and 11 others had attained Twenty-five; that *Mary Ann Kevern* and four others of the Grandchildren had died, and all of them before *P. Mounier* attained Twenty-five. The Master also found who were the Personal Representatives of the deceased Grandchildren; that the Testator and his Widow died at the times mentioned in the Bill; that *Charles Kevern*, who was the Testator's only Next of Kin living at his decease, was since dead, and that the Defendant *William Williams* was the Personal Representative of *Charles Kevern*.

Sir *E. Sugden* and Mr. *Daniell*, for the Plaintiff, contended that those only of the Grandchildren who were born at the death of the Testator's Widow, were entitled to his Residuary Estate; and that the Payment merely, and not the vesting of the Shares, was suspended until they attained Twenty-five. *Walker v. Shore* (a), *Farmer v. Francis* (b).

To introduce the question of remoteness, it must be shown that [*175] none of the Grandchildren were intended to take, except those who attained Twenty-five. *Leake v. Robinson* (c), has no bearing on this Case: there the Gift was confined to such of the Legatees as should attain Twenty-five.

Mr. *Koe*, for Parties in the same interest as the Plaintiff, relied on *Farmer v. Francis* as being precisely in point.

Mr. *Knight*, Mr. *Preston* and Mr. *Garratt*, for the Grandchildren born after the death of the Testator's Widow, but before *P. Mounier* attained Twenty-five, said, that all the Grandchildren who were in existence at the period when the Testator had directed his Property to be distributed, were entitled to participate in it: *Whitbread v. Lord St. John* (d), *Gilbert v. Roorman* (e), *Mogg v. Mogg* (f): that it appeared, by the Report, that the Testator died in March 1798, and his Widow, in the April following, and that *Sophia Williams*, the eldest of the Grandchildren born after the Widow's death, was born in August 1798, so that she must have been in existence at the death of the Widow, and that, consequently, she, at all events, must be entitled to a share of the Testator's Residuary Estate.

Mr. *Parker*, for the three Grandchildren born after *P. Mounier* attained Twenty-five, said that, in order to give effect to the Testator's intention, the period of distribution must be when the youngest Grandchild should attain Twenty-five: that the Testator had directed his Trustees to [*176]

(a) 15 Ves. 122.

(b) 2 Sim. & Sta. 505

(c) 2 Mer. 363.

(d) 10 Ves. 152.

(e) 11 Ves. 233.

(f) 1 Mer. 654.

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preserve the remainder of his Property for the benefit of his Brother's Grandchildren, and to divide it amongst them when the youngest should attain Twenty-five; and the last part of the Will must be rejected, if the three youngest Grandchildren were held not to be entitled to share in the Testator's Residuary Estate.

Mr. *Kindersley* for the Defendant, *Charles Williams*.

Mr. *Bethell*, for the Defendants, the Personal Representatives of the Testator's Widow, said that the Bequest was void for remoteness, as it was a Gift to the Grandchildren of a Person who was alive, and therefore they could not be ascertained within 21 years after a life in being. In the Cases cited for the Plaintiff, the Gifts were made to Classes of Persons, all of whom were capable of taking. In *Leake v. Robinson*, Sir *W. Grant*, M. R. says: "To induce the Court to hold the Bequests in this Will to be partially good, the Case has been argued as if they had been made to some Individuals who are, and to some who are not capable of taking. But the Bequests in question are not made to Individuals, but to Classes; and what I have to determine, is whether the Class can take. I must make a new will for the Testator, if I split into portions his general Bequest to the Class; and say that, because the rule of Law forbids his intention from operating in favor of the whole Class, I will make his Bequests, what he never intended them to be, viz. a series of particular Legacies to particular Individuals, or, what he had as little in his contemplation, distinct Bequests, in each instance, to two different Classes, *namely, to Grandchildren living [*177] at his death, and to Grandchildren born after his death(g)." The same doctrine is laid down by the same learned Judge, in *Cambridge v. Rous* (h).

Sir *E. Sugden*, in reply, referred to *Davidson v. Dallas* (i).

The *Vice-Chancellor* said that, in *Leake v. Robinson*, no distinction was made between the time of Gift and the time of Enjoyment: that in this Case, those only of the Grandchildren were entitled to take, who were *in esse* at the death of the Tenant for Life.

Declare that the Defendants, *Peter Mounier*, *John Kevern*, *Mary Travers Kevern Mounier*, *Maria Jane Birdwood Parker*, the Wife of the Defendant *Joseph Parker*, the Defendant *John Kevern*, as the Administrator of *Maria Mounier Kevern*, deceased, the Plaintiff *Charles Kevern*, as the Administrator of *Mary Ann Kevern*, deceased, the Defendant *Sally Harwood Eales*, the Wife of the Defendant *Robert Eales*, and the Defendant *Sophia Williams*, appearing by the Master's Report, made in this Cause, to have been the only eight Grandchildren of *Charles Kevern*, deceased, in the Pleadings named, who were living at the time of the death of *Susannah Kevern*, the Widow of *William Kevern*, the Testator in the Pleadings named,

(g) 2 Mer. 390.

(h) 8 Ves. 12.

(i) 14 Ves. 576.

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are alone entitled to the clear Residue of the said Testator's Personal Estate, in equal Eighth parts or Shares.

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1832: 14th January.—*Probate Duty*.—*Appointment*.

Where a Testator having a general Power of Appointment over a Fund, exercises it by Will, Probate-duty must be paid in respect of the Fund.

THE Rev. *Thomas Dalton*, having, under an Indenture of Settlement of the 23d of May 1809, a general Power to appoint certain Trust Funds, by Deed to be executed by him, and attested as therein mentioned, or by Will, to be signed and published by him in the presence of, and to be attested by three or more credible Witnesses, by his Will dated the 19th of September 1825, which recited the Settlement, and was signed, published and attested as required for the due execution of the Power, directed and appointed that the Trustees should stand possessed of the Funds, in Trust to apply the same in payment of the Legacies thereafter given, and directed to be paid thereout. The Executor, in the Affidavit made by him as to the value of the Testator's Estate and Effects, pursuant to 55 Geo. 3, c. 184, s. 38, included the Fund subject to the Power, in the Sum deposited to, and paid Probate-duty on the whole amount. Having been afterwards advised that, inasmuch as the Testator had a power of Appointment only over the Fund, the same was not subject to Probate-duty, he applied to the Commissioners of Stamps for a return of the Sum which he had paid in respect of the Trust Fund; but his application was not complied with. In taking the accounts of the Testator's Estate under the Decree in this Cause, the *Master* refused to allow that Sum to the Executor, whereupon he excepted to the Report.

Mr. *Knight* and Mr. *Kindersley*, in support of the Exception, said that, as the Power which the Testator *had, was a general [*179] Power, the Fund, which was the subject of it, was part of his Assets, and was applicable to the payment of his Debts: that the Appointment was ineffectual until the Probate was obtained, and therefore it was obtained *in respect of* the Fund, (a) and *that the [*180] Executor had made the Payment upon a demand which the Crown, after consideration, insisted on.

(a) By 55 Geo. 3, c. 184, it is Enacted, That there shall be raised, levied and paid unto and to the use of His Majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several Instruments, matters and things mentioned and described

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Sir *E. Sugden*, Mr. *Walker* and Mr. *James Russell*, in support of the Report, said that the Executor had made the payment voluntarily, and not in consequence of any demand from the Crown: that 55 Geo. 3, c. 184, applied to the Personal Estate only of a Testator or Intestate, and not to what he had a mere Power over: that the Fund in question did not pass by the Probate solely, but by the Probate in conjunction with the Instrument by which the Power was exercised.

The VICE CHANCELLOR:

I think that, in this Case, the Duty was properly paid.

Under the Settlement, the Testator had a general Power over the Trust Fund, which he was at liberty to exercise either by Deed or by Will. He chose to exercise it by a Testamentary Instrument; and, consequently, he made the Fund, over which he had such general Power, part of his general

Personal Estate, and liable to be dealt with as part of his general [181] al Personal Estate. "The Act requires, [His Honor here read the 2d Section of 55th Geo. 3, c. 184.] And, in Part 3d of the Schedule to the Act, the following words are used: "Where the Estate and Effects, for or in respect of which such Probate, or Letters of Administration shall be granted." It was absolutely necessary that Probate should be granted, for the purpose of giving effect to the execution of the Power. The Testator, therefore, has, by the Instrument by which he exercised the Power, created the necessity of having Probate taken in respect of Property,

in the Schedule hereunto annexed, (except those standing under the head of Exemptions,) or for or in respect of the Vellum, Parchment or Paper upon which such Instruments, Matters and Things, or any of them shall be written or printed, the several Duties or Sums of Money set down in figures against the same respectively, or otherwise specified and set forth in the same Schedule; and that the said Schedule and all the Provisions, Regulations and Directions therein contained, with respect to the said Duties, and the Instruments, Matters and Things charged therewith, shall be deemed and taken to be part of the Act, and shall be read and construed as if the same had been inserted therein at that place, and shall be applied, observed and put in execution accordingly. § 2.

That, from and after the expiration of three calendar months from the passing of the Act, no Ecclesiastical Court or Person shall grant Probate of the Will, or Letters of Administration of the Estate and Effects of any Person deceased, without first requiring and receiving from the Person or Persons applying for the Probate or Letters of Administration, or from some other competent Person or Persons, an Affidavit, or solemn Affirmation in the case of Quakers, that the Estate and Effects of the deceased, for or in respect of which the Probate or Letters of Administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a Trustee for any other Person or Persons, and not beneficially, but including the Leasehold Estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the Debts due and owing from the deceased, are under the value of a certain Sum to be therein specified, to the best of the Deponent's or Affirmant's knowledge, information and belief, in order that the proper and full Stamp-duty may be paid on such Probate or Letters of Administration; which Affidavit or Affirmation shall be made before the Surrogate or other Person who shall administer the usual oath for the due administration of the Estates and Effects of the deceased. § 38.

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part of which was the Fund in question. I think, therefore, that the payment made by the Executor, was right (b).

Exception allowed.

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1832: 17th & 23d January.—*Laches*.—*Tenant for Life and Remainderman-man.—Lease Renewal.*

Testator bequeathed a Church Lease for 21 years, to A. for Life, remainder to his first and other sons, and directed the Lease to be continually renewed by the Persons in possession for the time being. A. neglected to renew, and the Lease expired in 1798. His eldest Son attained 21 in 1800. In 1830 A. died. In 1831 the eldest Son filed his Bill, praying to be compensated for the Loss of the Lease out of A.'s Assets. Held that he was entitled to the relief notwithstanding the lapse of time.

By an Indenture dated the 29th of November 1733, the Dean and Chapter of *Chester* demised the Rectory and Tithes of *Shotwick, Great and Little Sanghall, Capenhurst, Woodbank and Ledsham*, in the County of *Chester*, to *Samuel Bennett*, for 21 years at the yearly Rent of 30*l.* It being the custom of the Dean and Chapter of *Chester* to grant Renewals of their Leases at the expiration of every Seven years, [*182] provided application was made to them within Six months afterwards, Renewals of the before-mentioned Lease were granted to *Bennett* in 1742, 1749, and 1756.

Bennett, By his Will dated the 13th of September 1763, devised to *Edward Parnell* and *Thomas Brock*, and their Heirs, all his Messuages, Lands, Hereditaments and Real Estates, in *Great and Little Sanghall*, upon Trust, by Mortgage of the same or any part thereof, to raise so much Money as, together with certain other Money to come to their hands as therein mentioned, would be sufficient to pay his Debt and Legacies; and, in case sufficient Money could not be raised by Mortgage of his Estates in *Sanghall* for the purposes aforesaid, he gave, to his Trustees, the Tithes of the Township of *Sanghall* and elsewhere, which he then held by Lease under the Dean and Chapter of *Chester*, to hold for all his Estate and Interest therein, (with power for his Trustees to renew the same Lease out of their Trust-money) upon Trust, by Mortgage of the same Tithes, to raise so much more Money as would be sufficient, with the other Trust-money, to discharge the remainder of his Debts, Legacies, Funeral Expenses and Charges attending the Trusts of his Will; and, subject as aforesaid and chargeable as therein after mentioned, he devised all his Real Estates of Inheritance in *Great*

(b) See *In the matter of Cholmondeley*, 1 Crompt. and Meeson's Rep. 149.

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and *Little Sanghall*, and also his Manor of *Shotwick* and all other his Real Estates, to his Wife, *Martha Bennett*, for her life, with remainder to *John*, the son of his Nephew *Samuel Nevitt* for his life, with remainder to the Trustees to preserve Contingent Remainders, with remainder to *Samuel Nevitt's* first and other Sons in Tail Male, with remainders over.

[*183] The Will contained *the following Clause :—“ And, as to the said Tithes I hold under the said Dean and Chapter, the Lease whereof is renewable every Seven years, and which renewal is soon to take place, my Will is that my said Trustees shall first renew the same, and pay the Consideration-money thereof, out of their Trust-money, and take such new Lease in their names, to attend the devise of such Tithes by this my Will ; and, after such first renewal, I direct that the Person for the time being possessing such Tithes under this my Will shall continually renew the same Lease thereof, so that the possession of the same Tithes may be continued to the Parties for the time being possessing my Manor of *Shotwick*, so long and so far as may be by law ; and, therefore, I give and devise the said Tithes and all my Estate therein, with the right of renewal, and when renewed from time to time as aforesaid, subject to the Trusts and Powers aforesaid, to my said Wife, for her life, and after her decease, to the Person and Persons for the time being successively possessing my said Manor of *Shotwick*, under this my Will, and to go along with the Limitations of the said Manor, as far as may be without being subject or liable to any other charge or disposition than such Person can make of the said Manor.” The Testator appointed *Parnell* and *Brock* Executors of his Will, and died on the 23d of September 1763. In the month of November 1763, 1770 and 1777 renewed Leases of the Tithes were granted, for 21 years, by the Dean and Chapter, either to the Testator's Widow, or to *Brock*, the acting Executor of his Will. In December 1777 the Widow died, and upon her decease, *John Nevitt*, the Plaintiff's Father, (who afterwards took [*184] the name of *Bennett*,) entered into possession of the Estates *and Tithes comprised in the Will, as Tenant for Life under the Will.

In November 1784, the first Seven years of the Lease granted in 1777, expired ; and the Plaintiff's Father having neglected to apply for a Renewal until after the expiration of Six months from that time, the Dean and Chapter, on that account, refused to grant him any further Lease of the Tithes : and in 1798, the Lease of 1772 expired. In July 1800 the Plaintiff attained 21. His Father, by his Will dated the 2d of May 1823, gave a Field to the Plaintiff in Fee, and bequeathed the whole of his Personal Estate, to the Defendants, in Trust, after payment of his Debts, for his Daughters, and appointed the Defendants his Executors. In May 1830 the Plaintiff's Father died.

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The Bill was filed in January 1831. It alleged that the Plaintiff, until after his Father's death, was not aware of the existence of the Lease, or of the neglect to renew it: that, if his Father had duly renewed the Lease every Seven years, according to the Custom of the Dean and Chapter, the same would have been renewed in 1826, and the Plaintiff, as the Person in possession of the Estates devised by *Samuel Bennett*, would have been entitled, at the time of filing the Bill, to an unexpired Term of 17 years in the Tithes, and also to the Tenant right of Renewal, which had been wholly lost to him by his Father's neglect. The Bill prayed that it might be declared that the Plaintiff's Father was bound, pursuant to the directions in *Samuel Bennett's Will*, and to the Tenant right of Renewal, to have renewed the Lease in November 1777, and that the Plaintiff was entitled to an adequate compensation "from his Father's Estate, for the Loss ['185] of the Lease and Tenant right of Renewal; and that it might be referred to the *Master*, to ascertain the amount of such Loss, the Plaintiff being willing to allow, in taking such account, such reasonable Sum, if any, as he would have been bound to contribute towards the Fine and other Expense of such Renewal, and that the amount of the Compensation might be paid, to the Plaintiff, out of his Father's Assets.

The Defendants, in their Answer, said that the Plaintiff previous to his father's death, had, in his possession, a Copy of *Samuel Bennett's Will*, and had it in his power to have informed himself of its contents; and, therefore, they did not believe that, up to the time mentioned in the Bill, he was uninformed as to the Lease: that, in a conversation which the Defendant *Colley* had with the Plaintiff, shortly after his Father's death, *Colley* asked the Plaintiff whether, in or about 1800, (in which year the Plaintiff joined with his Father in suffering a Recovery of the Freehold Estates of which he was Tenant in Tail under *Samuel Bennett's Will*,) he heard his Father state any reason for not taking a new Lease of the Tithes, and that the Plaintiff, in reply, told *Colley* that he had at that time, heard his Father say that they were not worth continuing at the rate they then asked for them; that, therefore, the Defendants believed it probable that, in or about 1800, the Plaintiff acquiesced in the expiration of the Lease: that the Plaintiff's Father, from 1800 until his death, allowed the Plaintiff a yearly Sum of 100*l.*, and, at various times, advanced him Sums of Money, to promote his views in Life, and furnished him with Corn, Meat and other Articles for the use of his family, and otherwise conferred on him considerable "pecuni- ['186] ary and valuable benefits, and devised to him a piece of Freehold Land; and the Defendants believed that the Plaintiff's Father would not have done so if he had believed that the Plaintiff would have set up the Claim made by his Bill; and they submitted whether, the Plaintiff having accept-

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ed such benefits, with the knowledge of *Samuel Bennett's* Will, as before-mentioned, and that the Lease had been suffered to expire, without having asserted any right in his Father's life-time, ought to be permitted to make the Claim insisted on by his Bill, or, if he was so permitted, then whether he ought not to account for and give up all Money and other Benefits given to him, by his Father, either in his life-time or by his Will.

A Witness for the Defendants, deposed that he lived, as a Farm Servant, in the service of the Plaintiff's Father, for about 40 years, commencing about 50 years, ago; that it was well known, in the Country, when the Plaintiff's Father collected the Tithes, and also when the Tenancy ran out: that the Plaintiff had lived about four miles from *Sanghall*, where his Father resided, ever since he went Apprentice, (except for a short time, when he went to *London*,) and frequently came to visit his Father, at *Sanghall*; that it was well known, in the Family and by the Servants of the Plaintiff's Father, that his Tenancy of the Tithes had run out, and that he had lost the Tithes; and that the Witness considered it to be certain that all the Family of the Plaintiff's Father must have known that he had lost the Tithes.

Sir *E. Sugden*, Mr. *Pepys* and Mr. *Stuart*, for the Plaintiff:
[*187] *If the Plaintiff's Father had applied to the Dean and Chapter, in proper time, he might have had the Lease renewed. He was entitled to so much only of the produce of the Tithes as would have remained after setting apart sufficient to keep the Lease in existence. *Lord Mil-sintown v. Lord Portmore* (a). But he received and appropriated to his own use, the whole of the Produce, and his Son has got nothing; so that the Father's Estate has been enriched at the Son's expense. Even if the Father could not have renewed the Lease, he would not have been entitled to take the whole Profits of the Lease: for a Tenant for Life is not entitled to exhaust a perishable Fund.

The only ground on which the relief prayed by the Bill is resisted, is the length of time. But the Plaintiff's Title did not commence till 1830; and there is no trace of any knowledge in the Plaintiff that the Lease had not been kept on foot. A Party cannot wave what he had no knowledge of. The obligation on the Father was in the nature of a Trust: he was a Trustee of the Fund that would have been requisite to pay for the renewal. *Colegrave v. Manby* (b).

Mr. *Knight* and Mr. *Rolfe* for the Defendants:

If the Plaintiff ever had any right to sue, he has lost it by length of time. The time began to run from the moment when the Plaintiff might first have filed his Bill. *Harrison v. Hollins* (c), *Price v. Copner* (d), *Foster v. Blake* (e). The Father, down to the time of his death, was en-

(a) 5 Madd. 471.

(b) 2 Russ. 238.

(c) 1 Sim. & Stu. 471.

(d) Ibid. 347.

(e) 4 Bligh, 140.

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joying what the Son had a right to 'have impounded. If the Son [*188] had sued the Father before his death, the Father would have had an Answer to the demand on the ground of acquiescence ; and the Suit against the Assets can only be sustained on the ground that the Father himself was liable. The Son allowed the Father to live and die under the impression that he was not liable to the Demand.

It was said that the Son was ignorant of his Rights ; but it has been proved that he was on intimate terms with his Father ; and that it was well known in the Family, that the Lease had expired, and that the Tithes were received by other Persons. The Tithes in question were the Tithes of an Estate which the Father held ; and he was liable to pay them in consequence of his having lost the Lease. Could the Son be ignorant that his Father was paying Tithes for his Estate ? The Son must have known of the Will of *Samuel Bennett*, for he joined in the Recovery. And, if he knew of the Will, he must have known of the Lease, and of the direction in the Will as to renewing the Lease.

Sir *E. Sugden* in reply :

We do not contend that the Plaintiff did not know of *Samuel Bennett's* Will, but that he did not know that the Trust or Direction contained in it respecting the renewal of the Lease, had not been performed. There is nothing to fix the Plaintiff with knowledge that the Trust was not performed. *Foster v. Blake* and *Harrison v. Hollins* have no application. They were Cases between Tenant for Life and Remainder-man on the one hand, and a third Person claiming adversely to them both. Here both Parties claim under the same Title. A Case of successive Rights, 'is [*189] quite different from a Case in which a Remainder-man is seeking a Remedy against the neglect of the Tenant for Life. It is quite clear that wherever the Tenant for Life is to do an act for the benefit of the Remainder-man, which benefit is to accrue to him at the death of the Tenant for Life, the Remainder-man is not bound to inquire, until the death of the Tenant for Life, whether the act has been done. He may wait till the death of the Tenant for Life, though he may, if he pleases, have his Remedy sooner. The Father's Estate has been benefited by the Breach of Trust, and the Plaintiff is entitled to be indemnified out of it.

The VICE-CHANCELLOR :

I shall take time to consider this Case. The only point on which I have any doubt, is the length of time. The Cases cited have been, certainly, met by the Argument in Reply.

The VICE-CHANCELLOR :

The only question which I wished to consider in this Case, was whether the objection which has been made with respect to the lapse of time, is a

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valid objection, so as to prevent the Plaintiff from having the relief which he asks.

By the Will of *Samuel Bennett*, a Trust was imposed, personally, upon the Tenant for Life of the Leasehold Estate, that he should, after one Renewal had been made by the Trustees of the Testator, renew the Lease; the words being: "And, after such first Renewal, I direct that the Person for the time being possessing such Tithes under this my Will, shall continually renew the same Lease thereof, so that the possession of the [*190] *same Tithes may be continued to the Parties for the time being possessing my Manor of *Shotwick*, so long and so far as may be by Law; and, therefore, I give and devise the said Tithes, and all my Estate] therein, with the Right of Renewal, and when renewed from time to time as aforesaid, subject to the Trusts and Powers aforesaid, to my said Wife, for her Life, and, after her decease to the Persons for the time being successively possessing my said Manor of *Shotwick*, under this my Will."—Now the Father of the Plaintiff was in possession, as Tenant for Life, of the Lease; which, being a Lease for 21 years, and, according to the Customary Courtesy of the Cathedral Church at *Chester*, renewable every seven years, would have been renewable in the year 1784. It appears, from the evidence, that, if there had been a proper course adopted by the Tenant for Life, he might have renewed the Lease; and if he had renewed the Lease in the year 1784, there is no reason whatever, upon the Evidence, to conclude that the Renewals might not have been had in succession; so that, at the time when the Testator died, there would have been a Lease in existence, to the benefit of which the Plaintiff would have been entitled. I think, therefore, that the subsequent non-renewals of the Leases, must all be referred to, and considered as derived from the original neglect, in the year 1784, to renew at that time. It was said, by the Counsel for the Defendants, that, inasmuch as there was not a Renewal in 1784, at that time the injury to the Plaintiff commenced; and, inasmuch as he attained his age of 21 in the year 1800, he ought then to have filed his Bill, and because he did not file his Bill in the year 1800, by the lapse of time, he is barred from having any relief in this Court; and three Cases were cited: the [*191] case of *Price v. Copner*, "in which the principle is acknowledged which was laid down by Sir *Thomas Plumer*, M. R., and, afterwards, by the House of Lords, in *Cholmondeley v. Clinton* (*f*), and also the Cases of *Harrison v. Hollins*, and *Foster v. Blake*. Those Cases decided only that, where there had been the commencement of an adverse right, that adverse right might be so matured and perfected by the lapse of time, that, after a given lapse of time, a Court of Equity would not give relief. Let us

(*f*) 2 Jac. & Walk. 1, and 4 Bligh, 1.

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then consider what would have been done if the Plaintiff had filed a Bill immediately upon his coming of age, or rather, what would have been done, if, during his Infancy, a Next Friend had filed a Bill in his name. It is perfectly true that, when the Renewal was not made in the year 1784, there was a prospect of damage created; because it might be inferred that, inasmuch as the Renewal was not then made, the Dean and Chapter might not think proper to renew at any subsequent time. Now that would be the state of the Case at that time; but the ultimate damage which would have to be suffered by the Person in remainder, when his remainder came into possession, was not complete, and the precise amount of it could not, at that time, be ascertained; and it is perfectly obvious that, until the death of the Tenant for Life, the precise quantum of damage could not be ascertained; because all that the Plaintiff could be entitled to, would be such portion of the Lease as should remain after the death of the Tenant for Life, after the last Renewal: and, inasmuch as the Tenant for Life might have died at any time during the space of seven years between the granting of the Lease which might be in existence at his death and the time for Renewal, it is perfectly obvious that, up to the time of the death of the [*192] Tenant for Life, the quantum of damage to be suffered by the Tenant in remainder, is unascertainable. Then what Relief could have been given? A Court of Equity might, I conceive, if the Bill had been filed immediately upon the non-renewal at the proper time, have imposed a Receiver upon the Estate, and have sequestered the Rents and Profits, so as to form a Fund out of which, whenever an opportunity of Renewal occurred, a Renewal might be had: but then it is quite clear that, if a Fund had been created during the life of the Tenant for Life, for the purpose of Renewal, the Tenant for Life, at any time, might have had the whole of that Fund transferred to him, upon renewing, at his own expense, or without expense, if he could contrive to procure a Renewal without it. It follows, therefore, that though there was an incipient damage commenced in the year 1784, and though there was a prospective damage during the whole life-time of the Tenant for Life, yet that ultimate damage against which a Court of Equity would ultimately be called upon to relieve, would not happen until the death of the Tenant for Life; and my opinion, therefore, is that, though there might have been a preventive relief administered during the life of the Tenant for Life, the ultimate measure of justice to be distributed between the Tenant for Life's Estate and the Person to take in remainder, could not be defined until the death of the Tenant for life. The consequence is that the only Bill which could be filed, so as to obtain the precise amount of Relief in respect of the damage sustained, is the Bill which would be filed immediately on the death of the Tenant for Life. Now the Plaintiff's Father

1832.—*Spires v. Sewell.*

died on the 2d of May 1830, and the Bill was filed in January ['193] 1831 ; and my opinion, therefore, is that the lapse of time is no bar to the relief: and, therefore, it must be referred, to the *Master*, to ascertain what is the damage which the Plaintiff has sustained by reason of the non-renewal of the Lease by the Tenant for Life, according to the Terms of the Will ; and the damage which the *Master* shall so find, must be paid out of the Assets ; and the Assets also must bear the Costs of the Suit.*

SPIRES v. SEWELL.

1832: 19th January.—*Practice.—Costs.*

A Bill had been dismissed for want of Prosecution. Before the Costs were paid, the Defendant died, and the Plaintiff filed another Bill, for the same object, against the Defendant's Executor. The Proceedings in the latter Suit were stayed, until the Costs of the former were paid.

A BILL which had been filed by the Plaintiff in this Cause, was dismissed for want of prosecution. The Defendant to that Bill afterwards died ; and the Plaintiff, before he had paid the Costs of the Suit, filed the Bill in this Cause, against the Defendant *Sewell*, who was the Executor of the Defendant in the former Suit. The object of both Suits was the same.

Mr. *Pepys* and Mr. *K. Parker*, for the Defendant, now moved that the Proceedings in this Suit might be stayed, until the Plaintiff had paid the Costs of the former Suit. They cited *Pickett v. Loggon (a)*, *Holbrooke v. Cracraft (b)*, and *Standen v. Edwards (c)*.

Mr. *Knight* for the Plaintiff, read an Affidavit, in order to show that the Plaintiff was entitled to the Fund, which was the subject of the Suit, and which had been brought into Court in the first Cause, and asked ['194] that the Defendant might take the Costs out of that Fund, the Plaintiff being in indigent circumstances.

The *Vice-Chancellor* said that he did not think that it was incontrovertibly clear that the Plaintiff was entitled to the Fund in Court, and granted the Motion.

* Affirmed by the Lord Chancellor, 16th December 1833.

(a) 5 Ves. 706.

(b) Ibid. note.

(c) Beames on Costs, 369.

1832.—Greening v. Beckford.

WILSON v. CALVERT.

1832: 21st January.—Practice.—Evidence.

THE Plaintiff had examined a Witness respecting a Conversation between the Defendant and the Witness. The Plaintiff declined to read the Deposition, at the hearing of the Cause, as it made against him. The Defendant then proposed to read the Deposition, as his Evidence.

But the *Vice-Chancellor* ruled that the Defendant was not at liberty to read the Deposition, as it was not Evidence for the Defendant as to whose Conversation it related.

*GREENING v. BECKFORD.

[*195]

1832: 23d January.—Priority.—Incumbrance.—Notice.

A. being entitled to a Reversionary Interest in a Fund in Court, assigns it to B. and, afterwards, to C. C. obtains an Order that the Fund shall not be transferred without Notice to him, and has the Order entered at the Accountant-General's Office. Held that he thereby gained Priority over B, who had not taken similar Precautions.

MRS. HUISH was entitled to a Share of a Fund in Court, in which her Father had a Life Interest. She and her Husband assigned her Share to *Gye*, for Valuable Consideration. A considerable time afterwards, they assigned the same Share to *Levy*, for Valuable Consideration. *Levy*, before he paid his Money, caused Inquiries to be made, at the Accountant-General's and Registrar's Offices, to ascertain whether any Order had been made restraining the transfer of the Share, and found that there was no such Order, nor any Notice of any prior Incumbrance. He then had the Share assigned to him, and immediately afterwards obtained an Order that it should not be transferred without Notice to him; and that Order was, without delay, left at the Accountant-General's Office, and entered.

The *Vice-Chancellor* held that *Levy's* right to the Fund was entitled to Priority over *Gye's* (a).

Mr. *Knight* appeared for *Levy*, and

Mr. *Bagshawe*, for *Gye*.

(a) See *Williams v. Thorp*, ante, vol. ii. p. 257, 570; *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Ibid. 30; and *Cooper v. Fynmore*, Ibid. 60.

1832.—*Marshall v. Holloway.*

[*196]

*MARSHALL v. HOLLOWAY.

1832: 23d January. *Tenant for Life and Remainder-man.—Covenant.—Personal Estate.*

A. having a Leasehold Estate on which he had covenanted to erect Buildings within a certain time, bequeathed it and also his Personal Estate, subject as to the latter, to the payment of his Debts, to Trustees, for B. for life with several Limitations over. A. died before the time expired, leaving the Covenant unperformed in part. Held that his General Personal Estate was liable to the performance of the Covenant.

THOMAS HOLLOWAY, Esq., by his Will, dated the 2d of September 1813, after giving some pecuniary Legacies, gave to the Plaintiffs, *Samuel Marshall* and *Vitruvius Lawes*, and to the Defendant *Faithful Croft*, all his Messuages, Houses, Buildings, Lands, Tenements and Hereditaments, as well Freehold as Copyhold or Customary and Leasehold, and also all Monies, Debts, Sums of Money, Stocks and Annuities in the Public Funds to him due, owing and belonging, and all other his Real and Personal Estate, Goods, Chattels, Property and Effects whatsoever and wheresoever, in possession, reversion, remainder, expectancy or otherwise howsoever, To hold the same unto and to the use of the said *Samuel Marshall*, *Vitruvius Lawes* and *Faithful Croft*, their Heirs, Executors and Administrators, according to the Nature and Tenures of the said Estates and Premises respectively, upon Trust to sell and convert into Money such parts of his Personal Estate as should not consist of Monies or Stocks or Annuities in the Government or Public Funds, and to collect and receive all Debts due to him, and thereout to pay and satisfy his just Debts and Testamentary Expenses, and also to retain and pay the several pecuniary Legacies thereinbefore bequeathed; and, after payment and satisfaction thereof, to lay out and invest, in their names, the clear surplus Monies arising from his Personal Estate, in the purchase of Stock in some of the Government or Parliamentary Funds, or

[*197] *upon Real Securities in *England*, and, in like manner, to lay out and invest the Dividends, Interest and Annual Proceeds of such Stocks and Securities, and the rest of his Personal Estate, and also the clear yearly Rents and Profits of his Real Estate, from time to time, as and when, and so often, and during all such times as any Person or Persons beneficially interested in or entitled to his Real and Personal Estates under the Trusts thereafter declared thereof, should be under the age of 21 years, adding all such Investments to his Personal Estate in order to accumulate the same: and upon further Trust, as and when each and every of his Grandchildren who should not become entitled to his Real and Personal Estates, or some Part or Share thereof, under the Trusts thereafter declared, should attain the age of 21 years, to raise and pay, out of his Personal Estate, to each and every of such Grandchildren not so entitled, the sum of 1,000*l.*; and, sub-

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ject to the Trusts thereinbefore declared, as to, for and concerning all his Freehold, Copyhold and Leasehold, and Real and Personal Estates thereby devised and bequeathed, and the Stocks, Monies and Securities to be purchased and invested as aforesaid, the Testator directed that the same Trustees should stand seised and possessed thereof upon Trust for his Grandson, the first or eldest Son then living of his Daughter *Catherine*, and then of the age of Five years or thereabouts, during his life, and, after his decease, upon Trust for the first and every other Son of his body lawfully to be begotten, successively, and the Heirs of their bodies respectively, and, in failure of such Issue, upon Trust for the second Son then living of his said Daughter, for life, and, after his decease, for his first and other Sons in Tail, with several Limitations over for the other Issue of his Daughter then born and thereafter to be born, with the ultimate Limitation to his own right Heirs and Next of Kin, according to the nature and tenure of the said Trust Estate respectively: Provided that such Person or Persons as should, under his said Will, be entitled to an Estate Tail in his said Real Estate, should not be absolutely entitled to his Leasehold and Personal Estates until he, she or they should attain the age of 21 years, and that his said Leasehold and Personal Estates should absolutely belong only to such Person or Persons as should first attain the age of 21 years and become entitled to an Estate Tail in Possession in his Real Estates under the Trusts aforesaid, and, in the mean time, the same Leasehold and Personal Estates should remain subject to the Trusts thereinbefore declared thereof.

The Testator died on the 22d of January 1816, leaving his Daughter, *Catherine*, the Wife of *Horatio Martelli*, his Heir at Law and Next of Kin. She had several children living at the Testator's death, and one born afterwards. *Horatio Francis Kingsford Martelli* (who afterwards took the name of *Holloway*) was her eldest Son.

By the Decree made at the hearing of the Cause, on the 12th of April 1820, the Will was established, and the Trusts were directed to be carried into execution, except so far as the Will directed the Income of the Testator's Real, Leasehold and Personal Estates to be accumulated, which direction was declared to be too remote and void (a). And it was declared that *H.F.K. Martelli* was entitled, in possession, to [*199] the Rents and Profits of the Real and Leasehold Estates, and to the Dividends, Interest and Annual Proceeds of the Personal Estate, for his life, with remainder to the first and other Sons of his Body, successively, according to seniority of age, and the Heirs of their Bodies respectively, with such Remainders over as in the will contained. And the usual accounts were directed.

(a) The hearing of the Cause is reported in 2 Swanst. 432.

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It appeared, by the *Master's* Report made in pursuance of the Decree, that the Testator was, at his death, the Lessee of the Opera-house and certain other Property, under a Lease of the 28th of February 1815, granted to him, by the Crown, for 99 years from the 5th of April 1814, at different Rents, amounting to 690*l.* *per Annum*, and by which Lease the Testator covenanted to build divers Houses and Buildings, and to make alterations and improvements in and about the Opera-house and other Premises mentioned in the Lease, namely, to build a new Front to the Opera-house, to build five Houses in Pall-mall, to build 17 Shops, with an Arcade, at the back of the Theatre, and seven Houses in Charles Street and the Haymarket, and to enclose the whole with a stone Colonnade, on or before the 25th of March 1818, which Buildings and Alterations were incomplete at the Testator's death, and required the immediate attention of his Trustees and Executors, and the Expenditure of large Sums of Money, in order to prevent Forfeitures and Penalties for breaches of the Covenants in the Lease: for which reasons the Trustees had proceeded to carry the engagements of the Testator into effect, by completing the Buildings and Alterations, and the same were then nearly completed; and, in so doing, they had [*200] expended large Sums of Money arising from the Testator's Personal Estate which had then come to their hands, the Rents and Profits of his Real and Leasehold Estates, and Sums which they had been under the necessity of borrowing in order to meet the expenditure.

The Cause was afterwards heard for Further Directions, and *H. F. K. Martelli* having been advised that the Trustees ought to have applied any part of the Rents and Profits of the Testator's Real and Leasehold Estates accrued after his decease, in the completion of the Buildings and Improvements before mentioned, in March 1828 presented a Petition stating that he should attain 21 in June following, and that a certain Sum therein mentioned was due to him in respect of such Rents and Profits, and submitting that he was a Creditor for that Sum, upon the Testator's Estate, and that the same ought to be raised out of the remaining Personal Estate of the Testator, and, if necessary, by Sale or Mortgage of a sufficient part of the Estates devised by his Will. By the Order made on this Petition, it was declared that the Plaintiff, as Tenant for Life under the Will, was entitled to the Rents and Profits of the Leasehold Estates which accrued due from the Testator's decease, but without prejudice to the Inquiry thereafter directed: And it was referred to the *Master*, to inquire and state whether, regard being had to the Testator's Debts, and the Covenants and Engagements entered into by him at the time of his death, and to the manner in which provision ought to have been made for the Payment, Performance and Satisfaction thereof out of his Estate, the Sum claimed, or any and what other Sum,

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was due to the Petitioner, in respect of the Rents and Profits of the Real and Leasehold Estates accrued since the Testator's [*201] death, and whether any and what part of the Testator's remaining Personal Estate, could be applied to the payment of the Sum so due, or whether the whole, or any and what part thereof ought to be raised by Sale or Mortgage of the Estates devised by the Will. The Master reported that 34,589*l.* 19*s.* 4*d.* was due to the Petitioner, in respect of the Rents and Profits of the Testator's Real and Leasehold Estates, and that certain Sums therein mentioned, being the remaining Personal Estate of the Testator, and amounting to upwards of 40,000*l.*, could be applied to the payment of the Sum so due. The Petitioner then presented another Petition praying that the Report might be confirmed, and that the 34,589*l.* 19*s.* 4*d.* might be paid to him, out of the Testator's remaining Personal Estate mentioned in the Report. That Petition now came on to be heard. (b)

Sir *E. Sugden* and Mr. *Willbraham* appeared for the Petitioner.

Sir *C. Wetherell* and Mr. *Humphry* for the Legatees in remainder, whose interest it was to contend that the expense of the Buildings and Improvements should be borne by the Leasehold Estate, which was a perishable Fund, rather than by the general Personal Estate, which was a permanent one.

There is not a word, in the Will, from which it can *be contend- [*202] ed that it was the Testator's intention that the burden of performing the Covenants in the Lease, should be thrown upon his general Personal Estate. On the contrary, the Petitioner's claim to be paid so large a Sum out of the Personal Estate, is inconsistent with the Will; for it clearly appears that the Testator's intention was accumulation. At the Testator's death, two years were left for the performance of the Covenants in the Lease. He could not have considered the performance of it as a Debt. *Wilson v. Knubley* (c). The value of the Leasehold Estate has been greatly increased by the Money which has been expended in erecting the Buildings and making the other Improvements on it. Consequently the burden of the Expenditure ought to be borne by the Tenant for Life, and those who will succeed to the Estate after him, in proportion to their Interests. The question is not between Realty and Personalty, but between Personalty of one description and Personalty of another, If a Leasehold Estate is devised to *A.* and the general Personal Estate to *B.*, *A.* cannot require *B.* to perform Covenants subject to which the Leaseholds are held. No one can contend that the Tenant for Life of the Leaseholds, could re-

(b) This was an amicable Suit: and, though some of the Parties objected to the Report, it was arranged that they should not except to it, but should state their objections at the hearing of the Petition to confirm it.

(c) 7 East, 128.

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quire the Covenants to repair and to insure, to be performed out of the Personal Estate.

There is no distinction between a Covenant to repair, and a Covenant to build. Even a Mortgage of Leaseholds, will go with the Estate: and the Party who takes the Estate, is not entitled to have the Mortgage discharged out of the Personal Estate. A devisee of a Real Estate subject to a Mortgage created by the Testator, is entitled to have the [*203] Mortgage discharged out of the Personal Estate, because the Personal Estate is supposed to have derived a benefit from the Money borrowed. The principle of the Decisions in *White v. White* (d) and *Allan v. Backhouse* (e), is applicable to the present case.

Mr. *Lynch* appeared for the Testator's Next of Kin, and Mr. *Phillimore* for the Trustees of the Will.

the *Vice Chancellor*, without hearing Sir *E. Sugden* in reply, said that the Covenant which the Testator had entered into to erect Buildings and make Improvements on the demised Premises, created a liability which his Personal Estate was liable to satisfy: and that the Crown might have compelled his Executors to perform the Covenant, so far as it remained unperformed at his death, out of his Personal Estate; that, if the Testator had agreed for the purchase of an Estate, and died before he had completed the Contract, this Court would have ordered the Purchase-money to be paid out of his Personal Estate: that it was decided, in *Vernon v. Lord Eymont* (f), that a Court of Equity will not allow a Residuary Legatee to take the Residue, without making provisions for Claims that might be made under Covenants entered into by the Testator: that it was idle to talk of Persons beneficially interested in the Personal Estate, until it was ascertained whether there would be any Residue, and especially in this Case where the Fund which was to be laid out upon the Trusts of the Will, was the clear surplus

[*204] Monies arising from the Testator's Personal Estate after payment of his Debts: that there was a material distinction between the Covenant in question, and a Covenant to repair, (so far, at least, as the Lessor was concerned,) as he had his security, in the value of the Property comprised in the Lease, for the small Sums that might, from time to time, become due: that, under Covenants for Renewal, the Fines became due at distant, and, in some cases, at uncertain periods; but here the Testator had covenanted to do certain acts within a short, limited time; and there was no difficulty in ascertaining, at his death, the Sum that would be required for the performance of the Covenant: that, in *Serle v. St. Eloy* (g) where an Estate in mortgage was devised subject to the Incumbrances thereon, and

(d) 9 Ves. 554.

(f) 1 Bligh, New Series, 554.

(e) 2 Ves. & Beam. 65.

(g) 2 P. W. 386.

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the Personal Estate was given to another Person, subject to the payment of the Testator's Debts, it was held that the Mortgage-debt must be paid out of the Personal Estate: that, in this Case, no Fund being provided for the performance of the Covenant, it must be satisfied out of the general Personal Estate, no part which could be taken until the Covenant was satisfied; and, consequently, that the *Master's* Report must be confirmed (*h*).

*LESTER v. GARLAND.

[*205]

1832: 24th January and 17th March.—*Fraud — Bankrupt. — Debtor and Creditor.*

A Trader, on his Marriage, received a Fortune of 5,000*l.* with his Wife; and settled a Sum of Stock in Trust for himself for life, with Limitations over for the Benefit of his Wife and Children, in the event of his becoming Bankrupt or Insolvent. And it was provided that, if he should survive his Wife, and the issue of the Marriage should fail, and he should then be or should have been a Bankrupt, 15 Sixty-sixths of the Stock should belong to the Wife's Next of Kin in Blood. No part of the 5,000*l.* was settled; but the whole of the settled Fund was the Husband's Property, and it did not appear, from any of the expressions in the Settlement, what was the consideration for the provision as to 15 sixty sixths of the Stock.— Held that the limitations over in the event of the Bankruptcy of the Husband, were good as to 15 Sixty-sixths of the Trust Fund, that being the proportion of the Trust Fund which the Wife's Fortune would have purchased, but were void as to the remainder.

By the Settlement on the marriage of the Defendant *Christopher Spurrier*, with *Amy*, one of the Daughters of *George Garland*, bearing date the 21st of September 1814, after reciting the intended marriage, and that *Miss Garland*, as a Legatee under the Will of her Uncle, *Sir John Lester*, was entitled to the sum of 1,000*l.*, and that *Christopher Spurrier*, in case the marriage should take effect, would, in her right, become entitled to that Sum, when she should attain the age of 21 years, and that *George Garland*, in consideration of his natural love and affection for his Daughter, and for augmenting her Fortune and Estate, had agreed to advance, in her favour, the sum of 4,000*l.* to be paid to *Spurrier*, who, on his part, had agreed, in consideration of the marriage, and in order to make a provision for his intended Wife, and the Issue of the marriage, to advance the Sum of 33,333*l.* 6*s.* 8*d.* Three per Cent. Reduced Bank Annuities, to be invested and settled in the names and upon the Trusts thereafter declared; [*206] and also reciting that the 4,000*l.* had been advanced and paid by *George Garland*, to *Spurrier*, who had transferred the 33,333*l.* 6*s.* 8*d.* Reduced Annuities to the Plaintiffs and to the Defendants *Peter Jolliff*

(*h*) See *Simons v. Bolland*, 3 Mer. 547; and *Bennett v. Colley*, ante, 181.

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and *William Jabber Spurrier* : It was agreed and declared between and by the Parties thereto, that the Plaintiffs and the Defendants *P. Jolliff* and *W. J. Spurrier* should stand possessed of the 33,333*l.* 6*s.* 8*d.* Reduced Annuities, upon certain Trusts therein mentioned, until the marriage should be solemnized, and after the solemnization thereof, upon Trust, to pay the Dividends thereof to *Christopher Spurrier* and his Assigns, for his life, or until, by or in consequence of any unforeseen misfortunes in Trade, or otherwise, it should happen that he should become Bankrupt or Insolvent, if ever such event should happen, and from and after his death, or from and after his Bankruptcy or Insolvency, if such misfortune should happen to him, then to pay and apply the Dividends of the Stock to and for the benefit of *Amy Spurrier* and her Assigns, during her life, and, in particular, from time to time, during the then remainder of the joint lives of Mr. and Mrs. *Spurrier*, in the event of any such misfortune as the Bankruptcy or Insolvency of Mr. *Spurrier*, to pay the Dividends for the sole and peculiar use of Mrs. *Spurrier* and her Children, (if any,) separate and apart from her Husband, and not in any manner subject or liable to his Debts, Control or Engagements, and without any right or power of her the said *Amy Spurrier*, to anticipate or assign, or, in anywise, charge or affect the growing payments thereof, and her receipts in writing alone, notwithstanding her Coverture, to be, from time to time, good and sufficient discharges for the same : and after the death of *Amy Spurrier*, subject nevertheless and without prejudice to the right of *Christopher Spurrier* to receive the Dividends until he should become a Bankrupt or Insolvent, should such event happen either in her lifetime or after her death, to stand possessed of the Capital in Trust for all and every, or such one or more exclusively of the other or others of the Children or other issue of the marriage, born in the lifetime of Mr. and Mrs. *Spurrier*, or the Survivor of them, as *Spurrier*, in his lifetime, or his intended Wife, after his death, in case she should survive him, should by Will appoint, and, in default of such appointment, if there should be but one Child of the marriage, the Stock to be for the Portion of such only Child, and to be an Interest vested in such only Child at his or her age of 21 years or day of marriage, and to be transferred to him or her at the same age, day or time, if the same should happen after the decease of the Survivor of Mr. and Mrs. *Spurrier*, but if otherwise, then immediately after the death of the Survivor ; and, if there should be two or more Children of the marriage, upon certain other Trusts therein declared for their benefit. And the Settlement contained the usual Provisions for bringing into Hotchpot the Shares of the Children to whom any appointment should be made, and for the Survivorship of the Shares of such of them as should die under 21 and unmarried, and for their advancement ; and also a Provi-

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so that it should be lawful for the Trustees, after the death of Mr. *Spurrier*, or from and after his becoming a Bankrupt or Insolvent, in case the same should ever happen, and after the death of Mrs. *Spurrier*, to pay and apply the whole, or such part as the Trustees should think fit, of the Dividends of the Portion or respective Portions to which any Child, Children or Issue should or might, for the time being, be entitled in "expect- [*208] ancy, for his, her or their maintenance and education ; and it was agreed and declared that if *Spurrier* should happen to become Bankrupt or Insolvent, and should survive his intended Wife, then, from and after such his Bankruptcy or Insolvency, and the death of his intended Wife, the Trustees should, during the remainder of his life, pay the whole of the Dividends of the Portion or Portions to which any Child or Children of the marriage, who should have attained 21, or be married, should, for the time being, be entitled (subject only to any such appointment being made to the contrary as aforesaid,) under the Settlement, to such Child or Children respectively, for his, her or their respective proper use and benefit. And it was also agreed and declared that, if there should be no Issue of the marriage, who by virtue of the Trusts aforesaid, should become entitled to an absolute Share of the 33,333*l.* 6*s.* 8*d.* Reduced Annuities, the Trustees should stand possessed thereof, and the then future Dividends thereof, in Trust for the Survivor of Mr. and Mrs. *Spurrier*, and his or her Executors or Administrators ; nevertheless, in case *Amy Spurrier* should die in the lifetime of *Christopher Spurrier*, and at the time of her death, or afterwards, there should be such failure of Issue of the marriage as thereinbefore mentioned, then notwithstanding anything thereinbefore provided or declared, it was thereby expressly provided, declared and agreed, that if, at the time of such failure of issue as therein mentioned, the said *Christopher Spurrier* should be, or should have been a Bankrupt or Insolvent, 15 equal Sixty-sixth parts of the 33,333*l.* 6*s.* 8*d.* Reduced Bank Annuities should go and belong to, and be in Trust for the Next of Kin in Blood of Mrs. *Spurrier*, at the time of her death, in the same manner as if she had died intestate and without ever "having been married and possessed thereof as Personal Estate. [*209] And it was further provided that the Trustees should after the death of *Spurrier*, or after his Bankruptcy or Insolvency, and after the death of Mrs. *Spurrier*, until the Capital Stock should vest absolutely in some Person or Persons under the Trusts of the Settlement, but subject to the Powers, Directions or Agreements thereinbefore contained for the application of all or any part of the Dividends of the Portion or Portions for the time being of any Child or Children of the Marriage, invest the Dividends or the then unvested or unapplied part or parts thereof as should not be paid or applied under the Powers, Directions or Agreements thereinbefore

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contained, in their names, on Government or Real Securities, so that the same might, during such suspense of vesting, accumulate for the benefit of the Person or Persons who, under the Trusts thereinbefore declared, might become entitled to the Funds from which such Accumulations should have respectively proceeded; and, after certain powers authorizing the Loan of the Stock, to Mr. *Spurrier*, on Mortgage, and the investment thereof in the purchase of Land, it was agreed and declared that the provision thereby made for Mrs. *Spurrier* was intended to be and should be accepted by her in lieu of all Dower, Thirds, Freebench or Customary or Widow's Part, which she might claim in any Lands, Tenements or Hereditaments whereof Mr. *Spurrier* then was, or at any time during the intended Coverture might be seised for any Estate of Freehold or Inheritance, or any Customary or other Estate or Interest to which Dower or Freebench was incident.

The marriage was solemnized soon after the execution of the Settlement, with the consent of *George Garland*, the Father of [*210] the Lady who was then an Infant. The Defendant *Amy Ann Spurrier* was the only Issue of the marriage.

By alterations which had, from time to time been made in the Trust Fund comprised in the Settlement, in pursuance of the Powers for that purpose contained therein, the 33,333*l.* 6*s.* 8*d.* Reduced Annuities were changed into 26,326*l.* 0*s.* 7*d.* Three and a Half per Cent. Reduced Annuities.

At and previous to the execution of the Settlement, *Christopher Spurrier* was a Trader, and, at the time of the issuing of the Commission after-mentioned, he was in Partnership, as a Merchant, with the Defendants *Peter Jolliff* and *W. Jubber Spurrier*. On the 7th July 1830, a Commission of Bankrupt issued against the Partners, under which they were found Bankrupts, and the Defendants *George Garland*, *John Fryer* and *Samuel Spratt Strong* were chosen their Assignees.

The Bill alleged that the Assignees claimed to be entitled to the Dividends to accrue due on the 26,326*l.* 0*s.* 7*d.* Three and a Half per Cent. Reduced Annuities, during the remainder of the life of *Christopher Spurrier*, and to the Capital thereof, in the event of such failure of Issue of the marriage as in the Settlement was mentioned; but that such Claim was disputed by and on the part of *Amy Spurrier* and *Amy Ann Spurrier*: and it prayed that the Rights and Interests of the Parties claiming to be entitled, under the Settlement, to the Dividends to accrue due on the 26,326*l.* 0*s.* 7*d.* Stock, during the remainder of the life of *Christopher Spurrier*, and to the Capital thereof, in the event before-mentioned, might be ascer- [*211] tained and declared; and that the Trusts of the Settlement might be carried into execution under the Decree of the Court.

The Defendants, the Assignees, by their Answer, claimed the Dividends of the Stock during the remainder of the life of *Christopher Spurrier*, and

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also the whole of the Capital thereof, in the event of such failure of Issue as in the Settlement mentioned, and in the event of *Christopher Spurrier* surviving his Wife, subject nevertheless, if *Spurrier* should survive his Wife, and, at the time of such failure of Issue aforesaid, he should be or have been a Bankrupt or Insolvent, to the Payment of fifteen Sixty-sixth Parts of the Trust Fund to the Next of Kin of Mrs. *Spurrier*. They said that the whole of the 33,333*l.* 6*s.* 8*d.* Stock was the exclusive Property of *Christopher Spurrier*, who was a Trader at and previous to the execution of the Settlement, and up to the time of issuing the Commission: and they insisted that the Settlement, so far as it limited, disposed of, or in any way affected or attempted to limit, dispose of, or in any way affect the Dividends of the Trust Stock, upon the Bankruptcy of *Christopher Spurrier*, and his contingent Interest in the Capital or any Part of the Capital thereof, upon his Bankruptcy, was a Fraud on the Bankrupt Laws, and ought to be declared fraudulent and void as against the Assignees and Creditors of the Bankrupt.

Christopher Spurrier, in his Answer, said he should not have been permitted to receive his Wife's Fortune, unless he had agreed to insert, in the Settlement, the Provisions as to his Bankruptcy and Insolvency.

*Sir *E. Sugden* and Mr. *Wheatley* for the Plaintiffs, the solvent Trustees of the Settlement, declined to take any part in the Argument. [*212]

Mr. *Knight* and Mr. *Turner* for the Defendants, Mrs. *Spurrier* and her infant Child:

It has been decided that, where a Bankrupt has covenanted to pay a Sum of Money, or has created a Charge on his Estate, which is to take effect on his Bankruptcy, it is a Fraud on his Creditors, so far as his own Property is concerned. But there is a distinction between a Charge which is to arise on Bankruptcy, and a Limitation which is to cease on that Event. In the case of a Charge, the Property vests in the Assignees at the instant when the Charge arises: here the Interest of the Assignees is entirely gone. The Decisions are confined to Cases of Debt or Charge taking effect at the time of Bankruptcy only; they never have been carried to the extent contended for on this Record. This is a Case of Limitation which is new *in specie*, and none of the Decisions affect the question that arises as to the validity of it. There can be no Doubt that Mr. *Spurrier* might have limited the Property to himself until he should alienate or attempt to alienate it, and then over. *Domett v. Bedford (a)*, *Wilkinson v. Wilkinson (b)*. Bankruptcy is a species of Alienation. So he might have limited the Property to the separate use of his Wife. It is absurd then to say that he might have wholly divested himself of the Property, and yet that he may not do it partially. The Wife

(a) 6 T. R. 684. 3 Ves. 149.

(b) 3 Swanst. 515.

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is to be considered as a purchaser, for Valuable Consideration, of
 [*213] every Limitation in the Settlement. Besides the ground on which the interference of the Court is here sought, is Fraud; but no Fraud has been committed. The Husband was not indebted at the time of the Settlement, and there is no ground for saying that he had either Fraud or Bankruptcy in his Contemplation.

At all events the Wife and Child are entitled to receive to the extent of 5,000*l.*, which was the Amount of the Wife's Fortune, out of the Life-interest of the Husband. On referring to the Registrar's Book, it appears that in *Higinbotham v. Holme (c)*, a Covenant had been entered into by the Wife's Father, under which some Fortune was to come to the Husband. Lord *Eldon*, C. refers to it in his Judgment, where he says: "And, as to the Consideration from the Covenant of the Father, which, though it may, perhaps, prove worth little or nothing, is to be regarded as a Consideration with reference to all the Provisions of the Settlement." The entry of the Decree is as follows: "His Lordship doth order that the Order made on the hearing of this Cause, dated the 17th day of July 1809, be affirmed, but without Prejudice to the Plaintiff *Sarah Higinbotham* claiming the Annuity on the death of her Husband, or claiming any lien on her Father's Property, he has covenanted to give her Husband upon the death of the Father."* The principle of that Decision was that the Bankrupt was bound to restore the Wife's Fortune. In this Case the Wife was a Purchaser, for Valuable Consideration, of every Limitation in the Settlement. Her Money was [*214] paid on a Contract which has failed, and consequently the Assignees can take nothing until they have restored the Wife's Fortune, out of the Life Estate of the Husband.

The Cases invariably make a Distinction between the Property brought by the Wife, and that of the Husband. *Ex parte Cooke (d)*, *In re Meaghan (e)*, *Ex parte Young (f)*. The principle that has been adopted is to give to the Wife an Equivalent for what she loses; therefore a reference should be directed to the Master, to calculate what is the Amount of that Equivalent, in order that the same may be deducted from the Property held in Trust; or, at all events, the Fortune which the Wife brought to her Husband, must be restored to her before the Assignees will be permitted to establish their Claim.

Mr. *Pepys*, Mr. *Ellison* and Mr. *Jacob*, for the Assignees:

Cases of this nature may be arranged under three heads: 1. Where a Trader gives a Security, which is to be enforced only in the event of his

* Reg. Lib. A. 1811. fol. 1209.

(c) 19 Ves. 88.

(d) 8 Ves. 353.

(e) 1 Sch. & Lef. 179.

(f) 1 Buck, 179; 3 Madd. 124.

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Bankruptcy. Such a Security cannot be made the foundation of any Claim, in the event of Bankruptcy.

2. Where the Wife's Property is settled, so as to revest in her in the event of her Husband becoming Bankrupt. The doctrine is that such a Settlement is good : for, "*cujus est dare, ejus est disponere.*"

3. *Where a Trader endeavours to settle his own Property, so [*215] that, in the event of his becoming Bankrupt, it shall not go to his Creditors. It is clearly settled that such a Settlement is void, as being a Fraud on the Bankrupt Laws.

The present Case ranges itself under this third head. In *Lockyer v. Savage* (g), the distinction is clearly drawn between the Husband's and the Wife's Property. In *re Murphy* (h), Lord Redesdale said: "The whole effect of the Clause, is to avoid the operation of the Bankrupt Laws, and then the question is whether a Person can be admitted to prove as a Creditor, on the foundation of an Instrument contrived for the purpose of defeating the effect of the Bankrupt Laws; where the only ground of the Claim is an Instrument executed for the Purpose of giving a right against Creditors, which would not exist against the Bankrupt if he were solvent. All the Cases in England have held this to be a Fraud on the Bankrupt Laws which cannot be supported: nor really can any thing, where the Contingency is an act of Bankruptcy, and where the Demand does not arise till an Act of Bankruptcy committed, be proveable under it, because it did not exist before it." In the matter of *Meaghan*, Lord Redesdale says: "In England, where a Provision of this kind is confined to the Property of the Wife, it is considered fair; but, when it goes beyond that, and attaches on the Property of the Husband, it is held to be fraudulent, because no bounds can be set to it: if a Trader can make a Provision of this sort to the Amount of 1,000*l.*, he may do so to the Amount of 100,000*l.*, and *so may stipulate, on his marriage, to take all his Property [*216] out of the hands of his Creditors by charging it, contingently, with Payment of Interest for his Wife and Children, as a Maintenance for them, though, in effect, a Provision for himself." The reasoning on which Lord Redesdale founds his Judgment, is applicable to the present Case.

In *Higginson v. Kelly* (i), Lord Manners, C., acknowledges the Rule of Law to be: "That a Trader cannot on his marriage, settle his Property in such a manner that, in the event of his Bankruptcy, his Wife shall be entitled to a Provision out of it, in prejudice of his Creditors." In *Higginbotham v. Holme* (k), the Settlement was made by a Man not in Trade at the time; but Lord Eldon, C., says: "This Settlement looks forward to a

(g) 2 Strange, 947.

(h) 1 Scho. & Lef. 44.

(i) 1 Ball. & Beatt. 252.

(k) 19 Ves. 88.

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change of intention, to the purpose of becoming a Trader ; and looks forward expressly to the possible consequences of that purpose ; and so looking forward to such a change of purpose, and to such consequences, it is a Limitation, by the effect of which the Estate would go to the Creditors ; that change being adopted with the express object of taking the Case out of the reach of the Bankrupt Laws ; and as to the Consideration from the Covenant of the Father, which, though it may, perhaps, prove worth little or nothing, is to be considered as a Consideration with reference to all the Provisions of the Settlement, though undoubtedly an Annuity might have been provided, by the Settlement, for the Wife, in all events ; yet it is not competent to a Party giving a Consideration for a Contract, that is a

[*217] direct Fraud on the Bankrupt Laws, to have the benefit of it."

Ex parte Young, Brandon v. Robinson (l), *Ex parte Hodgson* (m), *Ex parte Oxley* (n), *Ex parte Verner* (o).

It is not disputed that a Provision made for the Wife, out of the Property of the Husband, is void if it be made in the shape of a Charge, or of a Debt proveable in the event of Bankruptcy : but a distinction has been drawn between such a Provision and a Limitation. That distinction, however, cannot be supported on principle ; for the objection is to the intention with which the act is done, and not to the mode of doing it. If the Provision is void as being a Fraud on Creditors, it is equally so if it is effected by a Limitation. The vice is not in the form, but in the fraudulent intention. How can a Settlement be said not to be made in contemplation of Bankruptcy, when it provides against it. *Phipps v. Lord Ennismore* (p). In *Higginbotham v. Holme*, the Money which the Wife's Father had covenanted to pay, remained to be received ; and the Question was whether the Husband could take the benefit of the Executory Covenant, without giving his Wife what he had covenanted to settle on her. In the matter of *Meaghan*, it was held that the Wife was entitled to the Interest, for her Life, on the 600*l*. The Bond was payable before the Bankruptcy and the whole of the Money secured by it was proved. The Court said that it was a good Debt, but that there was a void Trust as to a Portion of it. This shows that the vice is not in the form but in the substance. *Ex parte Brenchley* (q).

[*218] The next question is whether the Wife is entitled to any Portion of the Stock comprised in the Settlement. It is a remarkable peculiarity in this Settlement, that it contains no Recital to show why the 15th Sixty sixth Parts were fixed upon as the Proportion of the Trust Fund which was to go to the Next of Kin of the Wife : but the Recitals clearly show that the whole of the Fund was the Property of the Husband.

(l) 18 Ves. 429.

(m) 19 Ves. 206.

(n) 1 Ball & Beatt. 257.

(o) Ball & Beatt. 260.

(p) 4 Russ. 131.

(q) 2 Glyn & Jam. 174.

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Now in order to entitle the Trustees of the Settlement to prove against the Husband's Estate, a Portion of the specific Property settled, must have been the Property of the Wife. *Ex parte Cooke* (r). If the grounds of the Decision in that Case are considered, it will appear that Lord Eldon was of opinion that the Money was substantially the Property of the Wife. If the Covenant could be supported on the ground of there being a Consideration for it, then every Covenant would be supported. It must, therefore, be rested on the ground that the Property was, identically, the Property of the Wife. *In re Meaghan*, *Ex parte Oxley* and *Ex parte Verner*, are all Cases in which Relief was given, to the Wife, on the footing that the Property was her specific Property. In *Ex parte Hodgson* (s), Lord Eldon allowed the Wife to prove the 500*l.*, but not the 80*l.*: his Lordship says: "I look upon this as a Marriage Agreement that the Property of the Wife, payable on her marriage, and to which she might become entitled from her Father, was what the Husband was to have the use of, until his Bankruptcy, or Insolvency. If the stipulation was that he should possess her Estate, subject to return it in case he became Bankrupt, that would do. It is clear, in this Court, that her Estate might be limited to him until he became [*219] Bankrupt. Declare that, as to the Sum of 500*l.*, a Proof may be admitted for the Wife; as, though in form a Bond, it is an Agreement as to her Estate, that it shall be enjoyed by her Husband, until he becomes Bankrupt; and it is to be considered, therefore, as a Limitation of her Estate until his Bankruptcy. As to the 80*l.*, let the Claim be struck out." The Case of *Ex parte Young* is not quite consistent with *Ex parte Hodgson*. The two Reports of the former Case (t), do not exactly agree. In the Report in *Buck*, the Vice-Chancellor is reported to have said: "The rule, is in order to avoid the obvious opportunity of Fraud, that it is only the Fortune of the Wife that can be settled to be paid upon that Contingency, I do not mean in specific but in amount." It does not, however, appear what the amount to be proved, was. In the Report in *Maddock*, it appears that the amount to be proved, was what the Bankrupt's Contingent Life Interest under the Settlement made by the Wife, sold for, but no more: and the Vice-Chancellor adds: "*Ex parte Meaghan* is so far in point." So that, according to this Report, the Wife must be supposed to have settled the value of the Husband's Contingent Interest, not at the time of the Settlement, but at the time of the Commission. If that Decision was right, then the Decision in *Ex parte Meaghan* was wrong, and the value of the Husband's Interest, in the 600*l.*, at the time of the Bankruptcy, ought to have been ascertained. The Principle of the Decisions is the restitution, to the Wife, of her own Property. *Ex parte Taffe* (u). There is nothing

(r) 8 Ves. 353.

(t) In 3 Madd. 124, and 1 Buck 179.

(s) 19 Ves. 206.

(u) 1 Glyn & Jam. 110.

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ing in the Settlement to show that the 33,333*l.* 6*s.* 8*d.* Stock [*220] *arose, in part, from the 4,000*l.*; much less from the 1,000*l.*, which was not then payable.

Mr. *Wood* appeared for the Defendants, *Joliff* and *W. J. Spurrier*.

Mr. *Knight*, in reply :

The Case of *Phipps v. Lord Ennesmore* has no application. There the Trust was, in part, for the maintenance of the Grantor. It has been said that no proof can be made on behalf of the Wife, unless it can be shown that part of the Property taken by the Assignees is hers *in specie*. But *Ex parte Cooke*, contradicts that; and, in *Ex parte Young*, it was distinctly held that the only question was amount. Here the 4,000*l.* and 1,000*l.*, which constituted the Fortune of the Wife, were paid on a consideration that has failed: to that extent there would be a right of proof against the Husband's Estate, and, consequently, a Lien on the property which was the subject of the transaction.

A Case should be stated for the opinion of a Court of Law, as to the validity of this Limitation.

The VICE CHANCELLOR:

By the Settlement made on the marriage of Miss *Garland* with Mr. *Spurrier*, it was recited that Mr. *Spurrier*, in case the marriage should take effect, would, in right of his intended Wife, become entitled to a Sum of 1,000*l.* when she should attain the age of 21 years; and that her Father had agreed to pay down 4,000*l.* to the Husband, who, in consideration of the intended marriage, and in order to make a provision for his [*221] *intended Wife and the issue of the Marriage, had agreed on his part, to advance a Sum of 33,333*l.* 6*s.* 8*d.* Three per Cent. Reduced Bank Annuities, to be settled upon the Trusts thereafter-mentioned. And then it recites that the 4,000*l.* had been paid, by the Father of the Lady, to Mr. *Spurrier*, and that he had transferred the Stock to the Trustees. The Settlement then declares that the Trustees are to stand possessed of the Sum of 33,333*l.* 6*s.* 8*d.* Reduced Annuities upon Trust, after the marriage, to pay the Dividends to Mr. *Spurrier* for his life, or until, by, or in consequence of any unforeseen misfortunes in Trade, or otherwise, it should happen that he should become a Bankrupt or Insolvent, and, after the death of *Spurrier*, or from and after his Bankruptcy or Insolvency, if such misfortune should happen, then to apply the Interest of the Trust Fund for the benefit of the Wife during her life, and, in particular, during the remainder of the joint lives of the Husband and Wife, to pay the Interest and Dividends for the separate use of *Amy Garland* and her Children. The Settlement then goes on to declare the Trusts for the Children after the death of the Husband and Wife, upon which nothing turns. Then there is

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a proviso that it shall be lawful for the Trustees, after the death of *Spurrier*, or from and after his becoming a Bankrupt or Insolvent, and after the death of Mrs. *Spurrier*, to apply the whole or such part as the Trustees shall think fit, of the Dividends of the expectant Portions of the Children, for their Maintenance and Education. And then it is provided that, if there shall be no Child of the marriage, who by virtue of the Trusts, shall become entitled to an absolute Share of the Trust Fund, then the Trustees shall stand possessed of the Trust Fund, in Trust for the Survivor of Mr. *Spurrier* and his Wife, but in case *she shall die in [¶*222] his lifetime, and, at her decease, or after that event, there shall be such failure of Issue of the intended marriage as thereinbefore mentioned, then, if at the time of such failure of issue, Mr. *Spurrier* should be, or should have been a Bankrupt or Insolvent, 15 Sixty-sixth parts of the Trust Fund shall belong to, and be in Trust for the Next of Kin in Blood of the Wife, at the time of her death. Mr. *Spurrier* having become a Bankrupt, the Bill is filed, by the Trustees of the Marriage Settlement, for the purpose of having the rights of the Parties declared.

A variety of Cases, beginning with the Case of *Lockyer v. Savage*, which was decided about 100 years ago, have established that, though there cannot be a Settlement of the Husband's own Estates so as to make his Life Interest cease in the event of his becoming a Bankrupt, in order that the benefit of the Estate might be given to the Wife or Children of the marriage, yet the Wife's Estate may be so settled. That I take to be the clear Rule: and it would be useless to travel through a vast number of Cases by which that Rule has been established, all of which may be found on referring to any of the late Cases on the subject.

In this Case, if, instead of expressing the mode of dealing with the Wife's Property and the Husband's in the way in which we find it stated in this Marriage Settlement, it had been stated, that it had been agreed that the Wife's Fortune should be invested in the purchase of a certain quantity of the Three per Cent. Reduced Annuities, and that the Husband should, with his own Funds, purchase so much of the Three per Cent. Annuities, as that the Income of the whole would yield 1,000*l.* a year, and that *then the Fund should be settled in the way in which the whole [*223] of this Fund is settled, nothing could be more plain than that, with respect to the Wife's Portion of the Fund, that is, the Fund purchased by the investment of her Money, the Settlement would be entirely good; and that, with respect to the Husband's Portion, the Settlement would fail so far as it professed, in the event of his Bankruptcy, to take away the benefit of his Estate from his Creditors, and to give it to his Wife or Children.

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I apprehend that the Parties to the Settlement in this Case, must have agreed that 15 Sixty-sixths of the Trust Fund should, in certain events, belong to the Next of Kin to the Wife, because they had calculated that, at the then price of Stocks, the 5,000*l.* the amount of the Wife's Fortune, would have purchased 7,575*l.* Three per Cent. Reduced Annuities, which is the amount of 15 Sixty-sixth parts of the whole Fund. And though the Parties to the Settlement have not expressed that the Provision in question was made on the calculation which I have suggested, I think that I am warranted in considering it to have been so made, by the course of proceeding which was adopted in the Case of *Higginson v. Kelly*, which was before Lord Chancellor *Manners*. In that Case a Person being in Trade had, in consideration of 1,000*l.*, his Wife's Fortune, conveyed a Leasehold House to Trustees, for his own use till his death or Bankruptcy, then, in either event, if his Wife were alive, to raise 1,000*l.*, for her separate use. Lord *Manners* says: "The Rule of Law, as stated by the Counsel for the Plaintiffs, that a Trader cannot, on his marriage, settle his Property in such a manner that, [*224] in the event of his Bankruptcy, his Wife shall be entitled to a Provision out of it, in prejudice to his Creditors, is perfectly correct, and, if they could have satisfied me that such was the case before the Court, I should have no hesitation in granting the Injunction. But though the Property in this Case, strictly speaking, is the Husband's, yet it, in reality, is the Fortune of the Wife, intended as a provision for her and her Children, in case of Bankruptcy of her Husband." His Lordship then says: "The same question came before me in the matter of *Stanford*, a Bankrupt: the case was, in circumstances, nearly the same as the present. I had some doubts, and finding the question had never been the subject of decision, I had a communication with Lord *Eldon* and Lord *Redesdale* upon it. I stated to them that it appeared that the intention on the executing the Settlement, was that the Fortune of the Wife, should be a Provision for her, but, through mistake, it was made to appear the Property of the Husband: and I submitted to them whether they were of opinion that I could so far correct the Deed of Settlement to meet the intention of the Parties, as to amend the mistaken form of the Deed, and mould it so as to be a valid Settlement. Both the learned Lords were of opinion that I was at liberty to do so; and I accordingly amended the Settlement. I am, therefore, in this Case, of opinion that the Settlement must be considered as made of the Fortune of the Wife of the Bankrupt, and that she, by means of her Trustees, is at liberty to proceed at Law to recover the House for the purpose of the Settlement." Now I do not amend the Settlement, but I am, I think, warranted, by the general tenor and substance of it, to declare that this Settlement is to be considered precisely in the same manner as if the amount of the Wife's For-

 1832.—Robertson v. Lord Londonderry.

tune was *5,000*l.* (for it is not worth while to make any distinction between the payment *in presenti* of 4,000*l.* and the payment of 1,000*l.* when the Wife attained the age of 21) and as if the 5,000*l.* had been invested in the purchase of Three per Cent. Reduced Annuities, and then a Settlement made of the whole Fund.

If the Parties wish to have that matter more rigidly inquired into, in order to ascertain, precisely, what proportion of the Reduced Annuities might have been purchased with the 5,000*l.* I will refer it to the *Master* to make the inquiry: but they may perhaps be content with having it declared that the 15 Sixty-sixths are considered as that portion of the Trust Fund which was purchased with the Wife's property, and that, as to so much of that Fund, the Limitation over in the event of the Bankruptcy or Insolvency of the Husband, is good; but that, as to the remainder, it is invalid.*

 NURSE v. BUNN.†

1832: 25th January.—Answer.—Plaintiff.

In this Case the *Vice Chancellor* ruled that, if a Plaintiff reads a passage from the Answer, as evidence, he is compellable to read all other passages in the Answer which are explanatory of the passage read, whether such other passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects.

See *Bartlett v. Gillard* (a), *Davis v. Spurling* (b).

 *ROBERTSON v. LORD LONDONDERRY.

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1832: 25th January.—Plaintiff.—Demurrer.—Amended Bill.

Defendant pleaded to the Bill, upon which the Plaintiff amended. The Defendant then filed a general Demurrer to the amended Bill. Held that the Demurrer was regular.

T. R. G. BRADYLL, one of the Defendants, put in a Plea to the Bill, alleging that a Commission of Bankrupt had issued against the Plaintiff, on the 30th of May 1820, under which he was duly found and declared a Bankrupt, and that certain Persons therein named, (who were not Parties to the

* The Inquiry was not taken.

(a) 3 Russ. 149.

 † *Ex Relatione.*

(b) 1 Russ. & Mylne, 64.

 1832.—Lord Anson v. Hodges.

Bill,) were chosen the Assignees to his Estate, and that the usual Assignment had been made to them, but that the Plaintiff did not, until after the date and execution of the Agreements in the Bill mentioned, and on which the Claims asserted by him in his Bill, were founded, obtain his Certificate, and, that therefore, such Rights and Interests were, at the time of filing the Bill, and also at the time of filing the Plea, vested in the Plaintiff's Assignees.

The Plaintiff submitted to the Plea, and amended his Bill, by making his Assignees Parties, and introducing new matter; but the Prayer remained unaltered, except by asking for an Injunction to restrain Lord *Londonderry* from erecting Buildings in violation of the Agreements. The Defendant, *Braddyll*, then demurred to the whole Bill, for want of Equity and other causes.

The Demurrer having come on to be argued, Mr. *Temple*, for the Plaintiff, objected that, as the Defendant had pleaded to the original Bill, he was not at liberty to demur to the amended Bill.

[*227] *But the *Vice-Chancellor* over-ruled the objection, and, after hearing the Arguments, allowed the Demurrer (a).

Mr. *Knight* and Mr. *Geldart* appeared in support of the Demurrer. (b)

 LORD ANSON v. HODGES.

1832: 29th January.—*Vendor and Purchaser.—Interest.—Deposit.*

Vendor filed a Bill for Specific Performance, but not being able to make a good Title, his Bill was dismissed, and he was ordered to return the Deposit with Interest.

This was a Suit for Specific Performance, by the Vendor of an Estate which had been sold by Private Contract. The *Master* had reported against the Title. The Plaintiff took Exceptions to the Report, which were over-ruled.

On the Cause coming on for Further Directions, it was ordered that the Bill should be dismissed, and that the Plaintiff should return the Deposit to the Defendant.

Sir *E. Sugden*, for the Defendant, then asked that the Plaintiff might be ordered to repay the Deposit, with Interest.

Mr. *Knight* and Mr. *Boteler*, for the Plaintiff, said that the Court could not order Interest to be paid on the Deposit, as it was not stipulated for by

(a) See *Bosanquet v. Marsham*, ante, Vol. IV. p. 573.

(b) The above Decision was affirmed by the *Lord Chancellor* on 5th August 1834.

1832.—*Langton v. Higgs.*

the Contract, nor were there any special circumstances in the Case. *Calton v. Bragg* (c). *Curling v. Shuttleworth* (d).

The *Vice-Chancellor* said that the Plaintiff had held out a representation that he could make a good Title to the Estate, on the faith of which the Defendant had been induced to pay the Deposit; that the Plaintiff had failed to make good the representation, and, therefore, justice would not be done to the Defendant, unless he was allowed Interest on his Deposit: and his *Honor* accordingly ordered that the Plaintiff should return the Deposit with Interest at 4l. per Cent. (e).

LANGTON v. HIGGS.

1832: 10th February.—*Debtor and Creditor*.—*Retainer*.—*Executors and Administrators*.

If an Executor or Administrator pays into Court, under an Order in a Cause, Money which he had received from the deceased's Estate, his right to retain a Debt due to him from the deceased, is not prejudiced.

This was a Creditor's Suit.

Under an Order in the Cause, the Defendant, *Mary M'Curley*, the Administratrix of the deceased Debtor with his Will annexed, had paid, into Court, a Sum of Money which she had received belonging to the deceased's Estate. It appeared, by the *Master's* Report, that she was a Creditor of the deceased, to the amount of 120l., and that his Assets were insufficient to pay his Debts in full.

Upon the Cause coming on for Further Directions, one of the questions was whether, in consequence of the Money having been paid into Court, the Administratrix was deprived of the benefit of the Right, which she would otherwise have had, to retain her Debt out of it.

Mr. *Treslove* and Mr. *K. Parker*, for the Plaintiff.

*Mr. *Jacob*, for the Administratrix, contended that, as she had paid the Fund into Court, in obedience to an Order in the Cause, she had not divested herself of her right of retainer, and that she was entitled to have the Fund in Court applied in satisfaction of her Debt, before the other Creditors could receive any part of it. *Loomes v. Stotherd* (a), *Franks v. Cooper* (b), *Cockroft v. Black* (c).

Mr. *Knight* appeared for another Defendant.

The VICE-CHANCELLOR:

The only question is, whether the Administratrix, having paid the Money

(c) 15 East, 223.

(d) 6 Bing. 121.

(e) See *Farquhar v. Farley*, 7 Taunt. 592, and 2 Sugd. Vend. Ninth Edit. 16, 17, & 18.

[(a) 1 Sim. & Stu. 458.

(b) 4 Vs. 763.

(c) 2 P. Wms. 298.

1832.—Murray v. Cauly.

into Court, which she had received on account of the Testator's Assets, has divested herself of the right, which she formerly had, to retain Money out of it, in satisfaction of her Debt; and, therefore, whether she has a right to be repaid, out of Court, that Money. Now I have not the slightest doubt upon the question, and am of opinion that, notwithstanding she has paid the Money into Court, her right of Retainer is unaffected. I shall, therefore, declare that, so far as the Administratrix has any Balance in her hands belonging to the Testator's Estate, she has a right to retain it in satisfaction of her Debt, and that she is entitled to receive, out of what she has paid into Court, so much more as will be sufficient to pay her Debt in full.

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*MURRAY v. CAULTY.

1832: 28th April.—*Practice*.—*Demurrer*.

Defendant on the expiration of his time for answering, lodged a Petition at the Rolls, for further time: and gave notice of his having so done to the Plaintiff's Clerk in Court. Afterwards, without revoking the notice, he filed a Demurrer. Ordered that the Demurrer should be taken off the File.

THE Defendant's time for answering expired on the 12th of March. On the 14th, he presented a Petition, at the Rolls, for an Order for time to Answer, and gave notice, to the Plaintiff's Clerk in Court, that he had done so. Having been advised, as it was alleged, that the Bill was demurrable, he withdrew the Petition, and, on the 16th of March, put in a Demurrer to the whole Bill.

Mr. *Knight* and Mr. *E. Montagu*, for the Plaintiff, now moved that the Demurrer might be taken off the File. They said that the Defendant had been guilty of a breach of good faith in filing the Demurrer after he had given Notice of his application for an Order for time to Answer: that, as soon as he had changed his intention, he ought to have withdrawn the Notice, and the Plaintiff might then have issued an Attachment against him; but that, if the Plaintiff had issued an Attachment, after service of the Notice, it might have been set aside, *Barritt v. Barritt* (a), and, consequently, that the Plaintiff had been deprived of an advantage, by the unfair conduct of the Defendant.

Mr. *Parry*, for the Defendant, said that the Defendant did not inform the Plaintiff that he had obtained an Order for time, but merely that

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he had lodged a Petition at the Rolls for that purpose: that the Defendant, when he gave the Notice, did intend to Answer the

(a) 3 Swanst. 395.

1832.—Billing v. Billing.

Bill, but that he changed his intention on finding that the Bill was demurrable; that the Notice did not prevent the Plaintiff from issuing an Attachment, *Stephens v. Neale* (b), *Newcombe v. Rawlings* (c), and that, as no Attachment had been issued, the Demurrer was filed in due time. *East India Company v. Henchman* (d).

The VICE-CHANCELLOR :

It is not unreasonable to conclude that, but for the Notice, the Plaintiff would have issued an Attachment against the Defendant; the Notice disarmed the Plaintiff from acting as he would otherwise have done. The judgment of Lord Eldon in *Barritt v. Barritt*, is conclusive upon this Case. If the Defendant, after the Notice was served, changed his mind, he ought to have revoked the Notice. I think that this Demurrer ought to be taken off the File.

Motion granted, with Costs.

*BILLING v. BILLING.

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1832: 30th April.—Will.—Construction.

Testator gave all his Property to Trustees, in Trust to invest it in Securities at Interest, for the use of his Nephew, to be paid at such time and in such manner as the Trustees should think fit; and when the Nephew should attain 21, that the Trustees should pay him the amount of the Interest or Proceeds of the Money come to their hands, as they might think most for his advantage, in Weekly or Quarterly payments, for his Life. Held that the Nephew took an absolute Interest in the Property.

JAMES BILLING made his Will, dated the 29th of September 1817, in the following words: "I, *Jas. Billing*, Surgeon of the Ship *Batavia*, now bound to *New South Wales*, in the service of his Majesty's Government, do hereby make this my last Will and Testament. I do hereby give, devise and bequeath all the Property I die possessed of, whatever it may consist, Money, Goods, Pay, Debts, Estates and Effects, of every kind or sort, which I possess or am entitled to at my decease, unto *John Billing of Quality-court, Chancery-lane*, and *Allen Billing*, of 86, *Strand, London*, in Trust that they, the said *John Billing* and *Allen Billing*, do invest and place the whole Proceeds and Amount, in such Securities, at Interest, for the use and benefit of my Nephew, *Jas. Edw. Billing*, to be paid at such time, and in such manner, as they the said *John Billing* and *Allen Billing* shall see fit and proper; and, when the said *Jas. Edw. Billing* shall arrive at the age of 21 years, that they the said *John Billing* and *Allen Billing* shall, by Deed, to

(b) 1 Madd. 550.

(c) 3 Madd. 246.

(d) 3 Bro. C. C. 372.

1832.—*Billing v. Billing.*

the said *Jas. Edw. Billing*, covenant and pay the amount of the Interest or Proceeds of the Money and Effects which shall have come to their hands as Trustees as aforesaid, as they may think most for his advantage, in Weekly or Quarterly payments, for and during his natural life."

[*233] The Testator died on the 30th of October 1819, leaving his Father his sole Next of Kin. *John Billing* died in November 1819. The Testator's Father died in December 1823. The Defendant *Allen Billing* took out Administration to him, and also to the Testator, with the Will annexed. *James Edw. Billing* died on the 15th of July 1830, at the age of 19, and Intestate. The Plaintiff was his Administrator.

The Bill submitted that *Jas. Edw. Billing* took an absolute Interest in the whole of the Proceeds of the Testator's Estate and Effects, or, if not, that he took an absolute Interest in the Dividends and Interest which accrued due thereon, between the Testator's death and his own: and it prayed that the Plaintiff might be declared to be entitled, as the Administrator of *Jas. Edw. Billing*, to the Capital of the Stock in which the Testator's Estate had been invested, and that the same might be transferred to him, by *Allen Billing*, or that it might be declared that the Plaintiff was entitled to the whole of the Dividends which had accrued from the stock, and which had not been properly paid or applied to or for the use of *James Edw. Billing*, and that the amount thereof might be paid to the Plaintiff.

The Defendant, by his Answer, said that *James Edw. Billing* was deaf and dumb; and that he believed that the Testator's intention was to make a Provision for him, for his life: and the Defendant submitted that the Testator's Estate, subject to *James Edw. Billing's* Life interest therein, was undisposed of by his Will.

Sir *E. Sugden* and Mr. *G. Richards* for the Plaintiff:

[*234] **James Edw. Billing* took the absolute Interest, in the Testator's property, under the first words of Gift. Those words would have been sufficient to pass the Fee in a Real Estate. *Newland v. Shepard* (a). The subsequent words are merely directory. It is a Principle, which has been established by a long series of Decisions, not to cut down an absolute Gift. *Harrison v. Foreman* (b).

Mr. *Knight*, Mr. *Hayes* and Sir *George Grey*, for the Defendant:

The latter part of the Will controls the former. The provision was made for a Minor, who could not receive the Principal. It is clear that the Testator did not suppose that he was giving power to the Trustees to pay or dispose of the Capital. If the Trustees had broken in upon the Principal during the Minority of *James Edw. Billing*, they would have committed a clear breach of Trust: and the Will expressly directs that, when *James Edw. Bil-*

(a) 2 P. W. 194.

(b) 5 Ves. 207.

1832.—*Tooker v. Annesley.*

ling should attain 21, the Trustees should pay the Interest, as they should think most for his advantage, during his Life : so that the subsequent part of the Will, reduced the prior Bequest to one for life. *Dawson v. Thorne(c).*

The VICE-CHANCELLOR :

In the first part of the Will, there is an absolute Bequest: and I cannot cut down that which is plain, because there is, in a subsequent part of the Will, an imperfectly expressed intention that *James Edw. Billing*, should take for life only.

*TOOKER v. ANNESLEY.

[*235]

1st & 24th May.—*Tenant for Life — Timber.*

A Tenant for Life subject to Impeachment for Waste, is entitled to the Interest of Money produced by the Sale of Timber cut by order of the Court.

JAMES TOOKER, Esq. by his Will, dated the 20th of May 1797, devised his Freehold Estates to *Arthur Annesley*, *William Gould* and *Francis Edwardes Whalley*, and their Heirs, to the use of the Plaintiff, his only Child,^a and her Assigns, for her Life, subject to Impeachment for Waste, but with power of cutting down such Timber as might be necessary for the Repairs of the Estate, with remainder to the Trustees, during the life of the Plaintiff, in Trust to preserve Contingent Remainders, with remainders, to the Plaintiff's first and other Sons, successively, in Tail Male, with remainders to her first and other Daughters in Tail Male, with remainders to her first and other Sons, in Tail, with remainder to her first and other Daughters in Tail, with remainder to the Defendant *Hyde Salmon Whalley*, and his Assigns, for his Life, subject to Impeachment for Waste, but with like power of cutting down Timber, for necessary Repairs, with remainder to the Trustees, during the life of the said *Hyde Salmon Whalley*, in Trust to preserve Contingent Remainders, with remainders to his Sons and Daughters, in such manner, and for such Estates as were therein-before limited to the Issue of the Plaintiff, with divers remainders over, and with the ultimate remainder to the Testator's own right Heirs.

The Testator died on the 7th of March 1813, leaving the Plaintiff, his only Daughter, his Heir at Law.

*The Plaintiff was unmarried : the Defendant *James Salmon* [*236] *Whalley*, an Infant, was the eldest Son of the Defendant *Hyde Salmon Whalley*, and was entitled to the first Estate of Inheritance under the Will.

(c) 3 Russ. 235.

1832.—Tooker v. Annesley.

The Bill alleged that there were growing, upon the Testator's Estates, several extensive Woods and Plantations of Oak, Ash, Elm and other Timber Trees, which were standing much too closely together, and, by reason thereof, were going very much to decay, and which, if permitted so to stand, would, every year, become of much less value, and that, if any part thereof should be cut down, and the Woods, and Plantations properly thinned, it would be greatly for the advantage of the Persons entitled to the Inheritance of the Estates.

The Bill prayed that it might be referred, to the *Master*, to inquire what Timber there was growing upon the Estates which was in a decaying condition by reason of its standing too thickly in the Woods and Plantations; and that such part thereof as the *Master* should from time to time direct, might be cut down and sold, and that the Money arising therefrom might be put out at Interest, under the direction of the Court, on Government or other Security, and that the Interest might be paid, to the Plaintiff, during her Life; and that the Money so invested, might be limited and settled to such Uses and for the Benefit of such Persons respectively as the said Estates comprised in the Will were limited and settled.

The Defendant *Hyde Salmon Whalley*, by his Answer, admitted the allegations in the Bill as to the Timber, and said that if part of it were cut down and the Woods and Plantations properly thinned, it would be for the advantage of the Persons entitled to the inheritance of the Premises, and submitted to the Judgment of the Court, whether the plaintiff was entitled to have the Interest of the Proceeds of the Sale of the Timber, paid to her during her life.

The Infant Defendant submitted his Interest to the Protection of the Court.

By the Decree it was referred to the *Master* to inquire and state whether there were any and what Timber Trees standing in the Woods and Plantations on the Testator's Estate, which were in a state of decay, and which would not improve by standing, or the standing of which would be prejudicial to the other Trees, and which it would be for the Benefit of all Parties interested in the Estates to have felled and sold.

The *Master* reported that the Timber Trees and Saplings described in the schedule to his Report, were in a state of decay, and would not improve by standing; and that he was of opinion that it would be for the Benefit of all Parties interested in the said Estates, that the Trees and Saplings should be felled and sold.

By the Decree on Further Directions, it was ordered that the Trees and Saplings mentioned in the Report, should be felled and sold, and the Proceeds brought into Court and invested.

Mr. *Knight* and Mr. *Losh*, for the Plaintiff, now contended [*238] that, as the Timber had been felled and sold, not wrongfully, but by order of the Court, the Plaintiff was entitled, for her life,

1832.—Tooker v. Annesley.

to the Dividends of the Stock in which the Proceeds had been invested: that it was beneficial, to the Persons in Remainder, that the Timber should be cut, as it was going to decay and would not improve by standing; so that they would get the value of it when it was at its greatest perfection, and the Tenant for Life would lose the *interim* use and enjoyment of it. *Wickham v. Wickham* (a), *Delapole v. Delapole* (b).

Sir E. Sugden, for the Defendants:

The Plaintiff is Tenant for Life, subject to Impeachment for Waste. She may, however, cut Timber for Repairs: but she is not entitled to the value of a single Tree. If the Court allows her to receive the Income of the Stock in which the Produce of the Timber has been invested, she will take two-thirds of the Value; for the Interest of the Tenant for Life is generally estimated at two-thirds, and the Interest of the Reversioner at one-third. The Timber has been felled at the instigation of the Tenant for Life. The Court had no power to break into the Settlement, and order the Timber to be felled, the Tenant in Tail being an Infant, and, therefore, incapable of consenting: much less has the Court any power to give, to the Tenant for Life, a large proportion of the Proceeds, when she is not entitled to the value of a single Tree, except for necessary Repairs. *Bewick v. Whitefield* (c), *Mildmay v. Mildmay* (d). There is an error in the Report of the former Case, which is corrected in the Note. The Case of **Delapole* [*239] v. *Delapole* cannot be considered as an authority. One Party asked for the Reference and the other submitted to it; and, therefore, the attention of the learned Judge was not drawn to the question. *Wickham v. Wickham* was a peculiar Case. It is not clear that, in that Case, the Tenant for Life was not entitled to cut the Timber: and the Order referring it to the Master to inquire what Timber ought to be cut, was made by consent. In *Osborne v. Osborne* (e) it appears, on referring to the Registrar's Book (f), that the Order was made by arrangement between all the Parties, and after the Master of the Rolls had hesitated to make the Order. So that nothing can be more meagre, in point of authority, than the Claim of the Plaintiff in this Cause, to be paid the Interest of the Timber-money, for her life.

The VICE-CHANCELLOR:

In this Case the Bill was filed by Miss Tooker, who is Tenant for Life of the Estate in question, subject to Impeachment for Waste, but with a power of cutting down such Timber as may be necessary for the Repairs of the Estate. The Bill was filed against the Tenant for Life in remainder, and his Son, who is the first Tenant in Tail in existence, and it represented that there was Timber upon the Estate which was going to decay: and the

(a) 19 Ves. 419.

(b) 17 Ves. 150.

(c) 3 P. W. 266.

(d) 4 Bro. C. C. 76.

(e) Cited 19 Ves. 423.

(f) Reg. Lib. B. 1814, fo. 1149.

1832.—Tooker v. Annesley.

Bill prayed that it might be referred to the *Master* to inquire what Timber there was growing upon the Estate, which was in a decaying condition by reason of its standing too thickly in the Woods and Plantations, and that such part thereof as the *Master* should from time to time direct, might be cut down and sold. An Order has been made under which Tim-
 [*240] ber has been *cut, and now the question is what is to be done with the Produce of the Timber which has been sold. It was insisted, by the Counsel for the Defendant, that there is no authority by which, in a Case like the present, the Court is justified in giving the Income of the Fund arising from the sale of the Timber, to the Tenant for Life in possession. With respect to the Case of *Bewick v. Whitfield*, it appears, when it is contrasted with the Extract from the Registrar's Book which is contained in a Note upon that Case, that it is not rightly reported; for it appears that not only the facts of the Case, but also what is represented as the *Lord Chancellor's* Judgment, are not correctly given. But it is observable that the *Lord Chancellor*, in his Judgment, admits that, if there be any damage done to the Tenant for Life, he ought to have compensation in respect of that damage.

There are not many authorities upon the question now before me; but I apprehend that the principle upon which the Court acts in directing Timber to be cut in cases like the present, is not the personal Benefit of the Parties, but the Benefit of the Estate itself—the Inheritance. That proposition is laid down, by the present *Master of the Rolls*, in a Case of *Hussey v. Hussey* (g). Now it is quite clear, from *Lewis Bowle's* (h) Case, that, where there is a Tenant for Life unimpeachable of Waste, or there is no Tenant for Life unimpeachable of Waste, if Timber is severed from the Estate, by the act of a Trespasser or by a Tempest, the Timber belongs either to the Person who represents the Inheritance as being Ten-
 [*241] ant for Life without Impeachment *of Waste, or to the Person who has the Inheritance, in case there be no such Tenant for Life. It is also a settled Rule, in this Court, that, whether there be an Estate unsettled, or an Estate settled, no Person who commits a Trespass, shall, by his own wrong, have any Benefit of the Timber cut. With respect to the unsettled Estate, the point was decided in the Case of *Tullet v. Tullet* (i). There an Infant was seised in Fee; and the Guardian, who was the Mother, cut down the Timber, as upon the part of the Infant. The Heir of the Infant brought his Bill to have the Money, which arose from the sale of the Timber, secured; and the Court held that no Benefit whatever should result to a Person who might become the sole Next of Kin-

(g) 5 Madd. 44.

(h) 11 Rep. 79.

(i) 1 Dick 322; S. C. Amb. 370.

1832.—Tooker v. Annesley.

of the Infant ; but that the Money should be reserved for the Benefit of Party entitled to the Inheritance. With respect to the Case of a settled Estate, what took place in the Case of *Williams v. The Duke of Bolton* (k), shows that a Tenant for Life who is impeachable of Waste, shall have no Benefit from the Timber that has been cut down.

In this particular Case, the Plaintiff, who is Tenant for Life, represents that though she herself has no right to cut the Timber, it is for the Benefit of the Inheritance that the Timber should be cut. Now what have been the Decisions upon the Question now under consideration. There seems to have been a considerable *hiatus* in the Decisions, from the time of Lord *Alvanley*, down to the Case of *Lewis v. Cray*, which is mentioned, by Sir *William Grant*, in the Case of *Wickham v. Wickham* (l). It appears, in *Williams v. The Duke of Bolton*, that, if *the Tenant ['242] for Life had not done the wrongful act, Lord *Thurlow* would have permitted him to receive the Dividends of the Stock in which the produce of the Timber was invested : and it appears, from what Sir *William Grant* says, in the Case of *Wickham v. Wickham*, of the Case of *Lewis v. Cray*, which was before Lord *Rosslyn* in 1798, that his Lordship gave the Interest of the Timber-money to the Tenant for Life, as Lord *Eldon* did in the Case of *Osborne v. Osborne* (m), and it also appears, by some of the multifarious proceedings which took place in that Cause, the whole of which I have read over in the Registrar's Book, that not only was the Interest given to the Tenant for Life, but part of the Money which had arisen from the Sale of the Timber, was actually applied in discharging the Incumbrances which the Tenant for Life was bound to keep down ; and in *Wickham v. Wickham*, after the matter had been fully argued, Sir *William Grant* held that he was bound by what both Lord *Thurlow* and Lord *Rosslyn* had done. And then there is the Decision of Sir *William Grant*, in *Wickham v. Wickham*, in the year 1814, to the same effect as Lord *Eldon's*. I think, therefore, that there is not only sufficient principle, but that I am actually bound, by the authorities, to say that, in this Case, the course that has hitherto been adopted, ought to be persevered in, and that the Costs of all Parties ought to be paid out of the Fund which has arisen from the Sale of the Timber, and that the Tenant for Life is entitled to the Interest of the Fund remaining after the payment of the Costs.

(k) 1 Cox. 72.

(l) 19 Ves. 423.

(m) 19 Ves. 423, cited.

1832.—*Newcomb v. Mathew.*

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*NEWCOME v. MATHEW.

1832: 3d & 4th May.—*Tithe of Mills.—Evidence.*

A new Mill erected on the site of an ancient Mill is exempt from Tithes: but if it is built partly on the site of the ancient Mill, and partly on a new site, it is not exempt.

In a suit for Tithes between a Vicar and the Occupier of a Mill, an old Map of the Parish, belonging to the Lord of the Manor, was not admitted as Evidence for the Defendant.

THE Plaintiff was the Vicar of *Tottenham* in Middlesex: the Defendant was the occupier of a Water Corn Mill in the same Parish. The Bill prayed for an Account and payment of the Sums of Money and other Remuneration received, by the Defendant, in respect of the Mill and the Corn and Grain ground thereat, since the Plaintiff's induction in November 1824, the Plaintiff offering to make, to Defendant, all just allowances, in respect of the Rent and Expenses of the Mill.

The defence set up in the Answer, was that the Mill was exempt from Tithes, as having been built upon the site of an ancient Mill: and, in order to prove that fact, a Map of the Parish, dated in 1619, and belonging to the Lord of the Manor, was produced by his Steward.

Sir *E. Sugden*, Mr. *Pepys* and Mr. *Bellasis*, for the Plaintiff, objected to the production of the Map as Evidence, because the question in this Suit related to a private Right, and the Map was a private one and related to private property, and did not come out of the possession of any Person under whom the Plaintiff claimed.

Mr. *Agar* and Mr. *Duckworth* for the Defendant, said that the Map was an ancient one, and belonged to the Lord of the Manor, who was interested in its being correct.

[*244] *The *Vice-Chancellor* ruled that, as the Right in question in this Suit, was a private Right, the Map was not receivable as Evidence.

At the conclusion of the arguments, His Honour delivered the following Judgment: I have always understood the Law to be that, where an ancient Mill, which was exempt from Tithes, has been taken down, or destroyed by Fire or any other accident, and a new one has been erected on the same site, the exemption extends to the new Mill: but, if the new Mill is erected partly on the old site and partly on a new one, that it is not protected from the payment of Tithes. In this Case the Evidence shows that the Mill in the Defendant's occupation, was not wholly erected on the foundation of the old Mill, but partly on the site of the old Mill, and partly on a new foundation. There must therefore be an account of the Tithes of the whole Mill, as far as it has been employed in grinding Corn and Grain for hire*.

* The Defendant, in his Answer, said that he had carried on the business of a Mealman, and had used his Mill for grinding Corn and Grain into Meal and Flour for the purposes of his

1832.—Attorney General v. Jones.

“Declare that the Plaintiff is entitled to the Tithe of the Profits of the Water Corn Mill in the Pleadings mentioned, so far as it has been employed in grinding Corn and Grain for hire. And this Court doth order and decree that the *Master* do take an account of such Tithe, and, to that end, it is ordered that he do take an account of the quantity of [*245] Corn and Grain ground for hire in the said Mill, from the 27th day of November 1824, to the time the Defendant ceased to be the occupier thereof, and also an account of the Sums of Money, or other remuneration as toll, received, by the said Defendant, in respect of the Corn and Grain so ground for hire : And it is ordered that the *Master* do set a yearly value, in the nature of a Rent, upon the said Water Corn Mill, in respect to its use in grinding for hire, and allow the Defendant such Rent : And it is ordered that the *Master* do also make an allowance to the Defendant in respect of Servants’ Wages, Repairs and other incidental Expenses, having regard to the relative proportion of the grinding of Corn and Grain therein for hire, and the other purposes to which the said Mill has been applied during the before mentioned period : And it is ordered that the *Master* do charge the Defendant with one-tenth part of the amount received by him for such grinding for hire as aforesaid, after deducting from such Sum of Money as shall be by him allowed to the Defendant in respect of the Rent and the other matters aforesaid.”

*THE ATTORNEY-GENERAL v. JONES.

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1832. 3d May.—*Practice.—Dismissal of Bill.*

In computing the time within which a Bill may be dismissed, on the ground of no proceedings having been taken since the Answer was filed, the intervals mentioned in the Nineteenth amended Order, are not to be reckoned.

THE Answer was filed on the 30th of December 1831. It had not been excepted to, nor had any further proceedings been taken in the Cause.

Mr. *Cockerell*, for the Defendant, now moved to dismiss the Information and Bill, for want of prosecution. He said that, under the Fourth of Lord *Lyndhurst’s* Orders, the Answer was to be deemed sufficient at the expiration of two Lunar Months from the 30th of December 1831 : that, by the Sixteenth Order, as amended, a Defendant is not at liberty to move to dismiss, after the expiration of two Months from the time when the Answer is

said business. See *Townley v. Colegate*, ante, Vol II. p. 297, and *Browne v. Woolsey*, ibid. 305. The Cases as to the Tithes of Mills are collected and observed upon in 1 Eagle on Tithes, 377. *et seq.*

 1832.—*Landon v. Morris.*

to be deemed sufficient: and that, in this Case, more than four Months had elapsed since the Answer was filed.

Mr. *Koe*, for the Plaintiff, said that, by the Nineteenth amended Order, the time between the last Seal after Michaelmas Term and the 10th of January 1831, which was the first Seal before Hilary Term, was not to be reckoned, and, consequently, that the Motion to dismiss was premature.

And the *Vice-Chancellor* so ruled, and refused the Motion.

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*LANDON v. MORRIS.

1832: 24th March, 13th April, and 12th Dec.—*Lis Pendens*—*Notice.*

The Plaintiff, previous to his marriage with *A.*'s Daughter, wrote a Letter to *A.* inquiring what fortune his Daughter was entitled to. *A.*, in reply, wrote to the Plaintiff, and stated that certain Houses were entailed on his daughter, after his decease. *A.* died, leaving his Daughter, his only Child, and having devised all his Real Estates to his Wife. It was then discovered that *A.* was Tenant, in Tail Male, of the Houses, with Reversion to himself in Fee. In January 1816, the Plaintiff and his Wife filed a Bill against *A.*'s widow, (who was in possession of the Houses, to have the Houses conveyed to the Plaintiff's Wife, conformably to the representation in the Letter, and for a Receiver, and an Injunction to stay proceedings at Law. An Injunction was granted, and the Widow having put in her Answer, the Injunction was, in January 1818, continued. On the same day the Plaintiff obtained an Order to Amend, but did not act upon it, or take any further proceedings, till May 1820. In April 1818, the Widow mortgaged the Houses, for 500 years, to *H.*, and, in May 1819, she sold an Annuity to *M.*, and secured it by a Conveyance of the Houses to Trustees in Fee; and in May 1819 she sold and conveyed the Houses, subject to the Mortgage and Annuity, to *W.* in Fee. Neither *H.*, *W.*, nor *M.* had then any notice of the Suit, or of the Plaintiff's claim. In January 1820, at which time *M.* had notice, the Houses were purchased by *M.*, and conveyed to him by *H.* and *W.* In May 1820, the Bill was amended. The Widow having gone abroad without answering the amended Bill, a Decree was taken *pro confesso* against her in November 1822. In December following, the Plaintiff had notice of the Conveyance to *M.*, but did not make him a Party to the Suit, and opposed his attending the Master upon the inquiries directed by the Decree. In March 1831, the Plaintiff filed a Bill against *M.*, stating the proceeding in the original Suit, and praying that *M.* might be decreed to convey the Houses to the Plaintiff's Wife, and for a Receiver. *M.* put in his Answer, and relied on the delay in the proceedings of the original Suit, the Decree having been taken *pro confesso*, the want of notice in *H.* and *W.*, and in himself when he purchased the Annuity, and on the Plaintiff not having made him a Party to that Suit; but the Court, on motion, granted a Receiver.

THE Plaintiff, Dr. *Landon*, previous to his marriage with the Plaintiff, *Maria Augustina* his Wife, wrote a Letter to *John Ready*, Esq., [*248] the Lady's Father, requesting to be informed what provision Mr. *Ready* intended to make for his Daughter, and what Fortune she was entitled to. Mr. *Ready*, in reply, wrote a Letter to Dr. *Landon*, dated the 29th of April 1800, stating that he was, at that time, unable to give up more than a House at *Bath*, and a Freehold Estate, in

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Cheshire, called *Coppenhall*, and that another Estate, called the *Oakhanger Hall* Estate, and three Houses, in *Lime-street*, *London*, were entailed on his Daughter after his decease. In June 1800, Mr. *Ready* proposed to Dr. *Landon* to insure his life for 2,000*l.*, to which the latter agreed; and, on the 17th of that month, a Memorandum of Agreement was signed by Dr. *Landon* and *Ready*, by which the latter agreed to settle the House at *Bath*, and the *Coppenhall* Estate, on Dr. and Mrs. *Landon*, and their issue; and Dr. *Landon* agreed to insure his life for 2,000*l.*, for the sole benefit of his intended Wife, in case she should survive him. Dr. *Landon*, as it was alleged, signed the Memorandum on the faith of the representations contained in the Letter, and, particularly, that Mrs. *Landon* would be entitled to the *Oakhanger* Estate, and the Houses in *Lime-street*, on Mr. *Ready's* decease. On the 20th of June 1800 the marriage was solemnized; and Dr. *Landon* immediately insured his life pursuant to the Agreement, and he had ever since continued to keep the Insurance on foot. Mr. *Ready* was a Widower at the time of the marriage; but he afterwards married. In April 1813, he died, leaving his Wife, *Sarah Albina Ready* and Mrs. *Landon*, his only Child, his Heir-at-Law, him surviving.*

On the 28th of February 1831, the Master made a separate Report, by which he found that, by an Indenture of the 8th of April 1818, Mrs. *Ready* mortgaged the Houses, to Messrs. *Hopkinson*, for 500 years, for securing 1,300*l.* and Interest; and that, by an Indenture of the 12th of June following, Messrs. *Hopkinson* assigned the Mortgage to *W. Read King*; and that, by Indentures of the 13th and 14th of May 1819, Mrs. *Ready* granted an Annuity of 108*l.* to *George Morris*, and charged the same upon the *Lime-street* Houses, and also conveyed the Houses to two Trustees in Fee, upon certain Trusts for better securing the Annuity. and subject thereto, in Trust for herself in Fee; and that, by Indentures of the 19th and 20th of May 1819, Mrs. *Ready* conveyed the Houses to *T. T. Wright* in Fee, subject to the Annuity and the Securities for the same; and that, by Indentures of the 25th and 26th of January 1820, *Wright* and *King*, together with certain other Parties, conveyed the Houses to *Morris* in Fee: and the Master found that, by the means aforesaid, the Legal Estate in the Premises, was then vested in *Morris*.

On the 31st of March 1831, the Plaintiffs filed a Bill against *Morris*, stating to the effect aforesaid, and that the Plaintiffs [*252] were advised and submitted that it was established, by the Decrees and Orders aforesaid, that they were entitled to have the Houses conveyed to Mrs. *Landon*, and to receive the Rents accrued since Mr. *Ready's* death;

* Owing to a defect of the copy, the printer omitted a paragraph at this place,—the substantial matter of which, will be found in the synopsis at the head of this case.

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and charging that, when the Plaintiffs commenced their Suit against Mrs. *Ready*, she a'one was seised of the Legal Estate in the Houses, and that *Morris* and the several Persons through or under whom he claimed, acquired their Estates and Interests in the Premises, from or under her, and by virtue of the Conveyances mentioned in the Report, all of which were made after the commencement of the said Suit, and that *Morris* was, therefore, bound by the Decrees and Proceedings in that Suit, and that the Plaintiffs were entitled to the benefit of them against *Morris*, and that he, before he completed his purchase of the Annuity, or before he completed his purchase of the Premises, was aware of the Suit, and had heard that the Premises were the subject of Litigation between the Plaintiffs and Mrs. *Ready*, and was aware of the Letter of the 29th of April 1800, and of the Plaintiffs' claim under the same, and that the Title-deeds of the Premises were in the possession of the Plaintiffs. The Bill prayed that *Morris* might be decreed to convey the Houses, to Mrs. *Landon*, and to let the Plaintiffs into possession thereof, and to account to them for the Rents received by him, and to deliver up to them all Deeds and Writings, in his possession, relating to the Premises, and that a Receiver might be appointed.

Morris, by his Answer, denied all knowledge of the Letter of April 1800, and said that, if any such Letter was written, it did not state the origin or nature of the Entail, or what Interest Mrs. *Landon* had in the [*253] Houses, and that Dr. *Landon* might, with common diligence, have ascertained, and was bound to inquire what was the nature of such Entail, and whether the same existed or not: he denied that the marriage was agreed to upon any other terms than those contained in the Marriage Articles of June 1800: he said that, after Mr. *Ready's* death, a Memorandum, in Dr. *Landon's* hand-writing, was found enveloped in the Articles, containing a description of Mrs. *Landon's* fortune, but in which the Houses in *Lime-street* were not mentioned, and that such Memorandum was evidence that, before the Articles were prepared, the Parties had discovered that those Houses were not entailed on Mrs. *Landon*, and that she had no Interest therein: that the Title-deeds of the Houses, which were taken possession of by Dr. *Landon* on Mr. *Ready's* death, related to the Title there-to long anterior to 1762; that Mrs. *Weedon*, long prior to that year, was seised in Fee of the Houses, so that Mrs. *Ready*, as claiming under the Wills of Mrs. *Weedon* and Mr. *Ready*, was able, in 1818, to show a Title to the Houses of more than 60 years, without referring to those Title-deeds: he denied that the Letter, if it ever existed, had been lost or mislaid by the Plaintiffs, or that they gave notice, to Mrs. *Ready*, or her Solicitor, of their pretended finding of it: he said that there were important variations between the original and the amended Bill, and that, in the former, it was not pro-

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tended that the Letter had been lost or mislaid and was afterwards found, and that an allegation, which had been introduced into the latter, that the Title-deeds of the *Lime-street Houses*, were treated and considered, by Mrs. *Ready*, as belonging to the Plaintiffs, was untrue: he said that Messrs. *Hopkinson* had no notice of the Suit instituted against Mrs. *Ready*, *or of the claim of the Plaintiffs, and that he, *Morris*, had no [*254] notice, and had never heard thereof, when the Indentures of May 1819 were executed, but believed that Mrs. *Ready* was seised in Fee of the Houses, and that she manifested a clear Title thereto, for more than 60 years, subject only to the Mortgage: that the Release of January 1820 contained a Covenant, on the part of *T. T. Wright*, to take the necessary steps for bringing the then pending Suit of the Plaintiffs to a termination, and get the Title-deeds of the Houses out of the *Master's* Office, and delivered to him, *Morris*, and to indemnify him from the Costs of the Suit; that he paid the Purchase-money for the Houses, and, on the execution of the last-mentioned Release, was let into the receipt of the Rents, and had so continued, without claim or molestation, until the filing of the Bill against him: that he was, for the first time, informed of the original Suit, a few weeks before he purchased the Houses, and he claimed the benefit of the Mortgage and other Deeds, in bar of the Plaintiffs' claim: that, though the Plaintiffs obtained an Order to amend their Bill on the 29th of January 1818, they delayed acting thereon until May 1820, which was some months after he had purchased and paid for the Houses: that the Plaintiffs did not procure an Attachment against Mrs. *Ready* for not putting in her Answer to the amended Bill, until the 8th of November 1820: that the Decree of November 1822 was made without notice to him, and that, in December following, the Plaintiffs had notice that the Houses had been conveyed to him; that he endeavoured to appear before the *Master*, on the Inquiry directed by the Decree, but his appearance was objected to by the Plaintiffs, on the ground that he was no party to the Suit; that, in consequence of such *objection, the proceedings before the *Master* were *ex parte*, [*255] and took place in the absence of him, *Morris*, by reason whereof some of the most material facts in the Case were not in evidence before the *Master*, but were suppressed and concealed from him, and that the *Master* was prevailed upon to make his Report of the 17th of March 1827, in which he stated and found divers matters not referred to him, to the prejudice of the question in dispute between the Plaintiffs and him, *Morris*, and that, if such matters were proper to be inquired into, then the *Master*, by such suppression and concealment, was misled, and the conclusion and findings of the Report, as they affected his, *Morris's* interest in the Houses, were not according to the true facts, of the Case: he insisted that the Decrees and Or-

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ders in the Suit against Mrs. *Ready*, were of no effect as against him, because he was no party to the Suit, and they were obtained by the Plaintiffs, who knew that he was seised of the Houses; that the whole of the proceedings, as against him, were not only *ex parte*, but fraudulent, and were carried on, purposely, in his absence, in order to prevent the truth and justice of the Case from coming to the knowledge of the Court: that, when he purchased the Annuity, Mrs. *Ready* informed him that the Title-deeds of the Houses had been lost, and that the only Title she could show was the before-mentioned Wills, and undisputed possession for 60 years; and that, on his agreeing to purchase the Houses, in January 1820, he was first informed of the Suit, and of the Plaintiffs' claims, and that they had, by some improper means, possessed themselves of some of the Title-deeds, but that he was, at the same time, informed, and had every reason to believe that such claims were unfounded, and that the Suit had not been proceeded in

[*256] since January 1818, and that such Title-deeds were more than 60 years old, and were quite immaterial: that the consideration for which he had purchased the Houses, was the utmost value thereof: and he submitted that he ought not to be ordered to produce any of the Deeds in his possession; and that, if it should appear that Mr. *Ready* was not entitled to devise the Houses, then Mrs. *Ready* became, on his death, entitled to her Dower out of them, and that he, the Defendant, was at all events entitled thereto and of the Arrears thereof: and he claimed the same benefit of his purchases, and of the several Deeds aforesaid, as if he had pleaded the same in bar to the Bill.

A motion was now made, on behalf of the Plaintiffs, for a Receiver, and that *Morris* might be ordered to pay into Court a Sum which he admitted he had received in respect of the Rents of the Houses, and that he might produce the Deeds which he had admitted, in his Answer, to be in his custody.

Mr. *Knight* and Mr. *Jacob*, for the Plaintiffs, in support of the Motion, relied upon the Defendant being a purchaser *pendente lite*.

Mr. *Pepys* and Mr. *Wakefield*, for the Defendant:

Under the circumstances of this Case the doctrine of *Lis Pendens* is of no avail.

[The *Vice-Chancellor* :—When was the Suit of *Landon v. Ready* commenced; and when was the first Incumbrance created?]

[*257] "The Suit of *Landon v. Ready* was instituted in 1816, and the first Incumbrance, which was the Mortgage to the *Hopkinsons*, was created in 1818.

[The *Vice-Chancellor* :—*Morris's* Title then commenced with the first Incumbrance, and that was created after the Institution of the Suit in *Landon v. Ready*.]

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The Answer denies that the *Hopkinsons*, under whom *Morris* claims, had any notice of the Suit. In May 1819, Mrs. *Ready* granted an Annuity to *Morris*, and conveyed the Houses to Trustees for securing the Annuity. The Answer denies that *Morris*, when he purchased the Annuity, had any notice of the Suit, or of the Plaintiffs' claim, but that he believed that Mrs. *Ready* was seised in Fee. of the Houses, and that she manifested a clear Title thereto for more than 60 years, subject only to the Mortgage. In January 1820, *Morris's* Title was completed by the Conveyance of the Fee. His Title being complete in January 1820, the Plaintiffs did not amend their Bill till May 1820, although they obtained an Order for that purpose, in January 1818. Mrs. *Ready* did not put in any Answer to the amended Bill, and the Plaintiffs did not obtain an Attachment against her for want of her Answer until November 1820. In 1821 an Order was obtained for taking the amended Bill *pro confesso* against Mrs. *Ready*; and, in November 1822, the Cause was heard, and the Bill was taken *pro confesso*. That Decree was made without notice to the Defendant. In December 1822, the Plaintiffs had notice of the Conveyance to the Defendant: but, notwithstanding they had such notice pending the reference directed by the Decree, they *objected to the Defendant appearing before the Master, who, therefore, [*258] proceeded *ex parte*: and the Answer alleges that the Master, in making his Report, was misled by suppression and concealment on the part of the Plaintiffs. The Decree of 1822 did not bind any rights, but only directed a reference to ascertain what Estate Mr. *Ready* had, in the Houses, at the date of the Letter, and at his death. As the Bill was not amended till May 1820, the amended Bill was not pending at the time when the Defendant's Title was completed by the Conveyance of the Fee. We are then to inquire whether it is a rule of this Court, that a Decree *pro confesso* on an amended Bill, destroys a Title which was perfected before the amendment.

[The Vice-Chancellor :—I do not understand that, by the Amendment, a new Case was introduced.]

[Mr. Knight :—The Prayer of the Bill remained unaltered.]

In *Preston v. Tubbin* (a) the Mortgagees were made Parties to the Suit; and the Decree was obtained upon the Record as it existed at the time when the Mortgage was made. The Case of *Sorrell v. Carpenter* (b) shows that the Court does not consider that the doctrine as to *Lis Pendens*, is entitled to extension; for the Lord Chancellor, in that case, says that, if there is a real and fair Purchaser, without notice, it is a very hard case, especially in a Court of Equity, to set such a purchase aside, and, if the Plaintiff makes

(a) 1 Vern. 281.

(b) 2 P. W. 482.

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any slip in his proceedings, the Court will not assist him to rectify [*259] the *mistake. There is a practice in this Court, which goes very far to contravene the Rule, namely, where the Court grants an Injunction to prevent a Party from parting with the Legal Estate pending a Suit. *Echcliff v. Baldwin* (c) That Case shows that, if there is an alienation pending a Suit, the alienate must be brought before the Court. In *Metcalfe v. Pulvertoft*, (d) the Lord Chancellor granted a Receiver, before Answer, on the application of a Purchaser *pendente lite*, and notwithstanding it was alleged that the Estate had been purchased at a third of its value. In a subsequent stage of that Suit, a Plea that the Plaintiffs had purchased *pendente lite*, and with actual notice of the Suit, was over-ruled (e). And it was laid down, by Sir T. Plumer, V. C., that the maxim, "*Pendente lite nihil innovetur*," must be taken in a qualified sense, and that the true interpretation of the Rule was that a Conveyance *pendente lite*, did not vary the rights of the Parties in that Suit; and that the maxim, understood as making the Conveyance wholly inoperative, not only in the Suit depending, but absolutely and to all purposes, in all future Suits, and all future time, was founded in error. In *Daly v. Kelly* (f) a Mortgage was made to *Kelly*; pending the Suit; but the House of Lords decided that the proceedings in the original Suit were not conclusive against him, and referred the Suit back to the Court of Chancery in *Ireland*, for the purpose of letting in the Mortgagee to bring before the Court the circumstances on which his Title depended. That decision assumes that the alienee must have some [*260] mode of asserting his Title. Here the Plaintiffs had *full knowledge of the existence of *Morris's* Title, and yet they refused to bring him before the Court. They knew that Mrs. *Ready* had no Interest at all, yet they seek to take advantage, against the Party who alone was interested, of a Decree which they obtained against a Person whom they knew to have no Interest. The Decree was obtained on a confession of a Case of which *Morris* could know nothing. Supposing the Decree had been obtained by consent, would it affect a third party? There is no difference, in this respect, between a Decree by consent and a Decree *pro confesso*. There is no Case in which a Decree, obtained upon a Bill which was amended after a Title had accrued to a Purchaser, has been held to be binding upon him.

There was great delay in the prosecution of the original Suit. The Injunction was continued in January 1818, and no further proceeding took place till May 1820. If a Party means to avail himself of the doctrine of *Lis Pendens*, he must show that his Suit has been actively prosecuted. *Preston v. Tubbin* (g).

(c) 16 Ves. 267.
 (e) 2 V. & B. 200.
 (g) 1 Vern. 286.

(d) 1 V. & B. 180.
 (f) 4 Dow. 417. 435.

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The *Vice-Chancellor* pronounced no Judgment upon the Motion; but, on the 13th of April 1832, after the Court had risen for the Easter vacation, His *Honor* delivered out an Order in the terms of the Notice of Motion.

The Defendant afterwards moved, before the *Lord Chancellor*, that the *Vice-Chancellor's* Order might be discharged; and, on the 12th of December 1832, his Lordship delivered the following Judgment:

“In 1800, upon the Plaintiff's marriage with the Daughter of [*261] Mr. *Ready*, there was a Letter written, by Mr. *Ready*, to him, giving an account of his Daughter's fortune; and, among other things, that Letter states that there are three Houses in *Lime-Street* entailed upon her after his death. The marriage took place between Dr. *Landon* and Miss *Ready*, and it turned out that, instead of the Houses in *Lime-Street* being entailed on the Daughter, Mr. *Ready* was Tenant of them in Tail Male, with the immediate Reversion to himself in Fee. He married again, and devised them to his second Wife, who was suffered to take possession of them, not so much in ignorance of the Letter which the Plaintiff must have recollected, as because he must have mislaid it. And it is, in the first place, said that the Plaintiff should not have so suffered her to take possession; but, if he had not the Letter, what else could he do? His Case could no other way be proved, but by its production; for discovery he could have none from the Widow, unless on the extremely improbable suspicion of her Husband having made her a confidant of the fraud he was practising, and, thereby, at once let her know that he attempted to defraud his Son-in-law, and had, in reality, imposed upon herself. It is also said that the Marriage Articles were drawn up by Mr. *Ready*, after the date of the Letter, and that the three Houses were not mentioned; but, in the operative part of the Articles they could not be mentioned, as there was no interest in them upon which it could operate. The objection then is reduced to this, that the recitals do not refer to them; but recitals there are none in the Articles, except that a marriage is agreed upon and about to be solemnized, and the sole object of the Articles, is to bind the Plaintiff to insure his Life for 2,000*l.*, and Mr. *Ready* to give up “a Freehold Estate, during his life, in consideration [*262] of the obligation to insure. Mr. *Ready* died in the year 1813, and, in January 1816, the Plaintiff files his Bill, against Mrs. *Ready*, to have the Agreement, contained in the Letter executed, (taking that statement in the Letter to be the Agreement,) and to have possession of the Houses given up. In March 1816, there is an Injunction to restrain Mrs. *Ready* from recovering possession.* In January 1818, her Answer comes in. In April

* It did not appear, by the Pleadings, that the Injunction was granted for that purpose.

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1818, the Houses are mortgaged for 1,300*l.* to *Hopkinson*, who assigned to *King*, her Brother-in-law. On the 14th and 15th of May 1819, she charges an Annuity of 108*l.* to *Morris* the Defendant. On the 19th and 20th of May she sells the Reversion in Fee to *Wright*, and he, in 1820, conveyed it to *Morris*, and then leaves the country. A good deal of observation arises upon the dates of these Instruments, upon the conduct of the Party making them, and upon her connexion with one of the Parties, to whom the Houses were assigned; but those observations, as they are not necessary for the present purpose, I forbear further to advert to. The Defendant, in all, pays 2,500*l.* for Property said to be of 200*l.* a year rental, and takes a Covenant that the pending Suit shall be brought to a close, and that he shall be indemnified from payment of the Costs of the Suit, and from all Actions, Suits and Claims on account thereof. This he admits in his Answer; so that it is not pretended he purchased the Reversion in Fee without notice, but only the Annuity of 108*l.*

[*263] The general doctrine of *Lis pendens* is not contested. *The principle of the decision in *The Bishop of Winchester v. Paine* (h) is admitted, that a purchaser *pendente lite*, is bound by the Decree made against the Person from whom he purchases; and, accordingly, a Decree of Foreclosure was held to bind the subsequent Mortgagees of an Equity of Redemption, though they had not been made Parties. And that Case, it may be observed, was stronger than this, inasmuch as an exception was taken to the Title, on this ground, by a Purchaser, and was disallowed, and a Specific Performance decreed.

Such being the acknowledged Rule, is there anything in the circumstances of the Purchase here in question, which can create an Exception in favour of the Party making it? I have adverted to some of the alleged peculiarities, in stating the facts of the Case, and have disposed of them. It is further said, and mainly urged that the Plaintiff knew there was another Party, and purposely went on in his absence, and without bringing him into Court, in order that he might be bound in his absence; and it is observed that there is no case of *Lis Pendens* which goes so far. It would, however, be a direct innovation of that doctrine, and quite unwarranted, either by the principle on which it rests, or by anything to be found in the Cases which have been decided upon it, if we were to allow an Exception of this description, and to enable a Purchaser to escape from the effects of the Suit, by showing that his purchase became known to the Party suing the vendor, and that this Party afterwards went on without calling upon him, or letting him in to defend Suit. That the Case is not now here on the merits,

(h) 11 Ves. 194.

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is certain ; and that payment into Court, and *change of possession by appointing a Receiver, would not be ordered if there seemed to be anything very doubtful now upon the merits, may be admitted. Possibly, if the Case were such as made it probable that the Purchasers under *Mrs. Ready* could disclose merits which she has not brought forward, things might be left to stand as they now do until the hearing ; but this is, in the highest degree, unlikely from the relation in which the Parties stand to each other : nor can we, in reviewing the circumstances of the Case, entertain any great doubt which way it is likely to turn. In making the Order, then, I take for granted that the whole of the facts to which I have adverted, entered into His Honor's view, and they appear to me sufficient to justify that Order.

STONOR v. CURWEN.

1832: 7th & 24th May and 9th June.—*Will.—Construction.—Executory Trust.*

Testator gave one Third of his Residue to his Niece, which he desired might be settled, by his Executors, on her, for her separate use, for her life, but to devolve to her Issue at her death, and failing Issue, then to revert to his Nephew. The Court directed the Third to be settled in Trust for the Niece, for her separate use, for life, and, after her death, in Trust for her Issue then living, and if there should be no such Issue, then in Trust for the Nephew.

ROBERT EWING, Esq., by his Will, dated the 20th of September 1814, after giving several Pecuniary Legacies, and appointing the Plaintiff and *W. Snaith*, Esq. his Executors, gave the remainder of his Property, Estate and Effects, to his Nephew, *James Ewing*, and his Niece, *Margaret Curwen*, then the Wife of the Rev. *Wm. Curwen*, that is to say, he left to his Nephew, *James Ewing*, two Thirds, or two parts in *three, [*265] of such Remainder and Residue, and, to his said Niece, *Margaret Curwen*, the other Third, or one Third part, of such Remainder or Residue ; which said one Third he desired might be settled, by his Executors, on his said Niece *Margaret*, for her separate use, during her life, and not put into the power or possession of her Husband *Wm. Curwen*, or any other Husband she might happen to have ; but to devolve to her Issue at her death, and, failing Issue, then to revert to his Nephew *James Ewing*, and his Heirs and Issue ; still, however, in such manner that neither *Francis Wheatley*, nor his (the Testator's) Niece *Martha Wheatley*, nor any Issue of the said *Francis*, should ever, in any case or event, be benefited thereby.

W. Snaith, and *W. Curwen*, both died in the lifetime of the Testator. The Testator died on the 24th of December 1827, leaving the Defendants *James Ewing* and *Margaret Curwen*, and *Isabella Curwen* and *Robert Ewing Curwen*, the two infant Children of *Margaret Curwen*, his surviv-

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ing. *Isabella Curwen* was born on the 10th of January 1814, and *Robert Ewing Curwen*, on the 15th of August 1815.

The Bill prayed that the Defendants might set forth what Rights and Interests they respectively claimed in the one Third part of the Testator's Estate and Effects, directed to be settled on the Defendant, *Margaret Curwen*; and that proper directions might be given for a Settlement of that Third, in pursuance of the directions of the Will.

The Defendants *Margaret Curwen* and her Children, by their [*266] Answers, submitted their Rights and Interests *under the Will, to the care and protection of the Court. The Defendant, *James Ewing*, by his Answer, submitted that, under the Will, *Margaret Curwen* was not absolutely entitled to one Third of the Testator's Residuary Property, but that the same ought to be settled under the Direction of the Court, according to the Trusts of the Will.

Mr. *Lynch*, for the Plaintiff.

Sir *E. Sugden* and Mr. *Chichester*, for the Defendant *Margaret Curwen*, said that, under the Gift in question, Mrs. *Curwen* would have taken an Estate Tail, if the subject had been Real Estate; but, being Personal Estate, she took an absolute Interest in it: that the Testator intended that all her Issue, to the last generation, should take, which could not be, and that, therefore, the Court was compelled to hold that the one Third of the Residue vested, absolutely, in Mrs. *Curwen*.

Mr. *Knight* and Mr. *Preston*, for the Infant Defendants, said that this was a Case of an Executory Trust; and that therefore, the Court would direct a Settlement to be made, so as to preserve the intention of the Testator; that, by giving the absolute Interest to the Mother, the Testator's intention in favour of her Issue, might be defeated *instantly*; and that the Court ought to direct the one Third of the Residue to be settled in Trust for the Mother for life, for her separate use, and, after her death, in Trust for such of her Issue as should be living at her death. *Leonard v.*

Earl of Sussex (a), *Papillon v. Voice (b)*, *Lord Glenorchy v. Bosville (c)*, *Jervoise v. The Duke of Northumberland (d)*, *Knight v. Ellis (e)*, *Wilkinson v. South (f)*, *Pinburg v. Elkin (g)*, *Morse v. Lord Ormonde (h)*, *Doe v. Lyde (i)*, *King v. Melling (k)*, *Clare v. Clare (l)*, *Burrell v. Crutchley (m)*. *Horne v. Barton (n)*, *Taggart v. Taggart (o)*.

(a) 2 Vern. 526.

(d) 1 Jac. & Walk. 559.

(g) 1 P. Wms. 563, 2 Atk. 311.

(k) 1 Vent. 214. 225.

(n) Cooper, 257.

(b) 2 P. Wms. 421.

(e) 2 Bro. C. C. 570.

(h) 1 Russ. 382.

(l) Ca. Temp. Talb. 21.

(o) 1 Scho. & Lef. 84.

(c) Ca. Temp. Talb. 3.

(f) 7 T. R. 555.

(i) 1 T. R. 593.

(m) 15 Ves. 544.

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Sir *Charles Wetherell* and Mr. *Wakefield* appeared for the Defendant, *James Ewing*.

The VICE CHANCELLOR :

The question in this Case arises on the Will of the Testator, *Robert Ewing*, by which he has given one Third of the Remainder and clear Residue of his Property, Estate and Effects to his Niece *Margaret Curwen* : “ and which said one Third I desire may be settled, by my Executors, on my said Niece *Margaret*, for her separate use during her life, and not put into the power or possession of her Husband, *Wm. Curwen*, or any other Husband she may happen to have, but to devolve to her Issue at her death, and, failing Issue, then to revert to my Nephew, *James Ewing*, and his Heirs and Issue, still, however, in such manner that neither the aforesaid *Francis Wheatley* nor *Martha Wheatley*, nor any Issue of the said *Francis*, shall ever, in any case or event, be benefited thereby.” The question made before me, was whether the whole amount of the one Third of the clear Residue is now to be paid to *Margaret Curwen*, or whether [*268] there must not be such a dealing with it as to give her a Life Interest only in it. It was insisted that, upon the words that are contained in this Will, she would be entitled absolutely ; because the words would give an Estate Tail in realty. But, in the first place, it must be observed that, if there had been a devise to Trustees to convey a Real Estate, in such words as these, by no possibility whatever could the Limitation to the Issue have coalesced with the Life Interest of *Margaret*, because it is directed, by the Will, that the one Third shall be settled on her, for her separate use, and, therefore, she could not have had the Legal Estate, as it must have been vested in Trustees. Independently, however, of that, the Trust created by this Will, is, clearly, an Executory Trust, and an Executory Trust as to which nobody can say that the words which the Party who has created the Trust, has used, are so clear, as at once to show what was the sort of Conveyance he meant. And, although I apprehend the law to be that, whether the Trust be Executed or Executory, the same construction must be put on the words, yet that means only in those cases where the words which declare the Executory Trust are so clear in themselves, as to point out what the Trust is to be.

Lord *Eldon*, in the Case of *Jervoise v. The Duke of Northumberland*, lays it down that, in those Cases of Executory Trust, where the meaning of the Party who declares the Trust, is imperfectly expressed, Courts of Equity take upon themselves so to modify the words as to carry into effect that which, upon the whole, appears to be the meaning of the Party, although it is imperfectly expressed. So too, in the case of *Marriage Articles*, if the Trust to be executed rest solely upon *the [*269]

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Articles, the Court will, notwithstanding the express words in the Articles, have regard to that which seems to be the manifest object of the Parties, namely, the making a Provision for the Issue; so that, if the Articles expressed, in plain words, that the Estate was to be settled on the Husband, for life, with Remainder to the Heirs of his body, although nothing can be less ambiguous, yet this Court will not execute the Articles in the words, but will direct a Settlement to be made in such words as appear to carry the intention of the Parties into effect. Now, therefore, the words in this Case being such as I have stated, it appears to me that they are, by no means, so clear as to permit me to say that they do give the absolute Interest, on the face of the Will, to the Wife. In the case of *Knight v. Ellis*, which was referred to in the Argument, the Direction was, with respect to the Monies to arise from the Rents and Profits of the Testator's Estates, that they should be placed out at Interest, during the natural life of the Grand-nephew; "and, after his decease, I give the said Monies to the Issue Male of my said Grand-nephew, and, in default of such Issue, I give the said Monies to my three Nieces." In that Case the *Lord Chancellor* held that the Grand-nephew was entitled for his life only. In the Case of *Jacobs v. Aymatt (p)*, the Devise was of the Rest and Residue of the Testatrix's Estate, both Real and Personal, to Miss *Lucy Cook*, to be placed at Interest until her age of 21 years or day of marriage, and then the whole thereof, together with the Interest accumulating thereon, was to be paid to and for her use, during her natural life, and, from and [*270] "immediately after her decease, to the Heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such Issue, or of the death of Miss *Cook* before her age of 21 years, or day of marriage, then to the Testatrix's Brother. And Lord *Loughborough*, in delivering his Judgment in that Case, says: "I admit the Rule in *Daw v. The Earl of Chatham*, that where Personality is so given, if the words would create a Tenancy in Tail in Land, it is absolute: but that Rule has never been extended further than where the words create a clear Estate Tail." And I am of opinion that the words in this Case do not create a clear Estate Tail, and, therefore, I declare that Mrs. *Curwen* is entitled to an Interest for life only.

There may be a question whether the Persons who are to take after Mrs. *Curwen's* death, are her Issue generally, or her Issue living at the time of her death; but all that I can do at present, is to make the declaration which I have stated: I cannot direct a Settlement to be made without having that question argued.

(p) 4 Bro. C. C. 542; and see 1 Madd. 376, note, and 15 Ves. 479, note.

1832.—*Stonor v. Curwen.*

Mr. Knight :—Should it not be referred, to the *Master*, to approve of a proper Settlement, having regard to the language of the Will, and then the question might come before the Court on Exceptions to the Report.

The *Vice-Chancellor* :—The objection to that course is that I should refer a mere point of Law to the *Master* ; and, therefore, I shall merely declare, at present, that *Mrs. Curwen* is entitled for life ; and let the Case stand for argument as to the nature of the Settlement to be directed.

*The Cause now came on to be argued as to the Trusts upon [*271] which the one Third of the Residue ought to be settled, subject to *Mrs. Curwen's* Life-interest therein.

Sir Chas. Wetherell, *Mr. Pepys*, *Mr. Wakefield*, and *Mr. Lynch*, said that the Testator had excluded his Niece, *Martha Wheatley*, and all her Issue, from participating in one Third of his Residuary Estate : that no Settlement ought to be made which would have the effect of giving vested Interests to *Mrs. Curwen's* Children ; but that, in order to effectuate the Testator's intention as it was to be collected from his Will, the Fund ought to be settled in Trust for such of the Issue of *Mrs. Curwen* as should be living at her death, and, in default of such Issue, in Trust for *Mr. Ewing* absolutely.

Mr. Knight and *Mr. Preston* said that vested Interests ought to be given to the Children of *Mrs. Curwen*, at 21 or marriage, and that the validity of the Limitation to *Mr. Ewing*, was very questionable, as there was nothing in the Will to confine that Limitation to a failure of Issue at any particular period. *Skey v. Barnes* (q).

The VICE-CHANCELLOR :

When this Case was last before me, I doubted whether it was necessary for me to make a Declaration as to the Rights of any of the Parties except *Mrs. Curwen*. The Will however directs, expressly, that the Property shall be settled, by the Executors, on the Testator's Niece, and, therefore, it evidently points to *an immediate settlement, which, of [*272] course, involves an immediate Declaration of the Rights of the Parties who may hereafter become interested in the Property. I think, therefore, that a Settlement should be directed.

In construing this Will, it is impossible not to see that the paucity of words in it, has created as much difficulty as is occasioned by the multiplicity of words in other cases ; and, if the Testator had only expressed his intentions rather more fully, we should have escaped all difficulty. But, in construing the few words that he has used, the most convenient rule is to give to them, as much as possible, their natural and simple meaning.

(q) 3 Mer. 335.

1832.—*Stonor v. Curwen.*

It having been decided that Mrs. *Curwen* takes only for life, the first question is, who are the Persons who can take by the designation of "her Issue." Now, in the first place, "Issue" is *nomen collectivum*, and will include both Children and the descendants of Children; and it seems to me, on looking at this Will, that that extended sense is, of necessity, to be given to the word "Issue," because the Testator, after having expressed, in the commencement of his Will, his disapprobation of the conduct of his Niece *Martha*, has declared that the one Third of his Residue is, in the event of the failure of the Issue of Mrs. *Curwen*, to revert to Mr. *Ewing*, in such manner as that, in no case, *Francis Wheatley*, nor *Martha Wheatley*, nor any Issue of the said *Francis*, shall be benefited thereby. It is quite clear, therefore, that, although the Testator might not have been aware of the inefficacy of what he has expressed he meant, in this part of his Will, to include, in the word "Issue," not only Children, but also descend-

[*273] ants of Children: "therefore, it appears to me that the term "Issue," in the preceding part of the Will, must be taken to comprehend both the Children and the descendants of Children of Mrs. *Curwen*. But then there are words from which I must infer that the intention of the Testator was that the Parties should, to a certain extent, take by succession or devolution, and that he did not mean that the Issue, generally, should take, because the words are: "to devolve to her Issue, at her death, and failing Issue, then to revert to my Nephew *James Ewing*:" and the natural construction of those words is that such Issue should take as should be living at the death of Mrs. *Curwen*. If, however, the word "Issue" is taken to include both Children and the descendants of Children, it would be unreasonable to suppose that this Testator, who evidently has looked to succession, could mean that a Child of a deceased Child should take co-extensively with the Children; and I think that the most reasonable construction which can be put upon these words, is that which will enable the Children living at the death of Mrs. *Curwen*, including the Issue of any Child that may have died in her lifetime, to take what is given to Mrs. *Curwen* for life, (such Issue taking such Share only as their deceased Parent would have been entitled to if living), and, if there be no Child of Mrs. *Curwen* nor any descendant of a deceased Child living at her death, then *James Ewing* to take, absolutely.

Declare, therefore, that a Settlement ought to be made of the Property in question, in Trust for Mrs. *Curwen*, for her Life, for her separate use, and, after her decease, in Trust for such of her Children as shall be [*274] living at her death, and for such Issue of Children dying "in her life time as may be living at her death, the Issue of any deceased Child to take such Share only as the deceased Child would have taken if liv-

1832.—Gordon v. Lord Reay.

ing, and, if there be no Child, nor any Issue of a Child of Mrs. *Curwen* living at her death, then in Trust for *James Ewing* absolutely.

GORDON v. LORD REAY.

1832: 5th May.—*Will.—Republication.*

Testator having Estates in Jamaica and England, by his Will, directed his English Estates to be sold, and 10,000*l.* to be paid, out of the Produce, to the Plaintiff. He afterwards sold his English Estates, and by an *unattested* Codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the Plaintiff, and charged all his Estates with the payment thereof. He then made another Codicil, which was duly attested, and in which he referred to his Will, and ratified and confirmed all the Provisions and Bequests which he had thereby made in the Plaintiff's favour. Held that the Jamaica Estates were liable to the Payment of the 10,000*l.*

ROBERT HOME GORDON, Esq., by his Will, dated the 17th of August 1812, and duly executed and attested, gave all his Real and Personal Estates in *Jamaica*, to Trustees, upon Trust, by Sale or Mortgage of all or any parts of his said Real and Personal Estates, to levy and pay such parts of his Debts (except Mortgage Debts) and his Funeral and Testamentary Expenses, and the Legacies or Sums of Money thereafter bequeathed, as his other Personal Estate thereafter bequeathed to his said Trustees should not be sufficient to pay, or as should not be paid out of the produce of his Real Estate in *Kent*, thereafter directed to be sold; and upon Trust, out of the Rents and Produce of his said Real and Personal Estates in *Jamaica*, to pay certain Annuities; and, subject to the Trusts aforesaid, to permit the Plaintiff, during her life, "to receive the net Rents and Produce ['275] of such of his last mentioned Real and Personal Estates as should not be sold, for her sole use and benefit, and, after the decease of the Plaintiff, to raise and pay some other Annuities and certain Sums of Money in gross, and, after the decease of the Plaintiff, to settle and convey such parts of his last-mentioned Real and Personal Estates as should not be sold, and the Equity of Redemption of such parts thereof as should be mortgaged, to the use of the Defendant, Sir *Orford Gordon*, for life, with remainders to his first and other sons successively in Tail Male, with divers Remainders over. And the Testator devised all his Real Estates situate in the County of *Kent* or elsewhere in *England*, unto and to the use of the same Trustees, their Heirs and Assigns, upon Trust, as soon as might be after his decease, to sell and dispose of the same, and, out of the Net Monies which should arise from such Sale, and the Rents and Profits to arise therefrom in the mean time, fully to pay all Sums of Money which he had borrowed, or might bor-

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row from any Person or Persons by way of Mortgage of the same Estates, together with such Interest as might then be due for the same, and, in the next place, to pay the Sum of 10,000*l.* sterling, unto and for the sole use and benefit of the Plaintiff, her Executors, Administrators and Assigns, and then to pay such of his Debts and Funeral and Testamentary Expenses, and of the several Legacies or Sums of Money thereby bequeathed as should not be paid out of his Personal Estate thereafter bequeathed to his Trustees, or otherwise in pursuance of any of the Trusts or directions thereinbefore declared. And he directed that the Residue of the net Monies to arise from such Sale or Sales as last aforesaid, should be laid out in the Purchase of *Lands, in Fee Simple, in *England*, and, if it should be thought proper, in Copyhold or Leasehold Lands convenient to be held therewith, and that the Lands so to be purchased, should be conveyed to the use of the Plaintiff for life, and, after her decease, to the same uses, and upon the same Trusts as he had directed to be contained in the Settlement which he had directed to be made of such his Estates in *Jamaica* as aforesaid: and, after giving certain specific and pecuniary Legacies to the Plaintiff and other Persons, the Testator gave all such other Personal Estate and Effects as he should die possessed of or entitled to, and which were not thereby otherwise specifically bequeathed or disposed of, unto the Trustees; upon Trust to convert the same into Money, and to apply the Produce thereof, so far as the same should extend, in Payment of his Funeral and Testamentary Expenses, and such of his Debts as should not otherwise be paid, and of the several Legacies or Sums of Money thereby bequeathed, or which he might give or bequeath by any Codicil or Codicils thereto: and he appointed the Trustees to be the Executors of his Will.

The Testator afterwards made a Codicil, dated the 8th of April 1814, and which was signed by him, but not attested, and which was as follows: "Whereas, since the date of my last Will and Testament, I have sold and disposed of my Estate in the County of *Kent*, which I, by my said Will, have directed to be sold by my Trustees in my said Will named, and out of the produce of such Sale, have given, to *Susanna Harriet Hope* therein named (the Plaintiff), the sum of 10,000*l.* for her own sole use and benefit: Now

[*277] I do, by this Codicil to my said Will, which I desire may *be taken as part thereof, declare that, notwithstanding the said Estate has been so sold by me as aforesaid, yet my Will is that the said Legacy of 10,000*l.* shall be paid to the said *S. H. Hope*, to whom I do give the same accordingly, and subject and charge all my Estates for the payment of the same." The Testator afterwards made a second Codicil, which was duly executed and attested, and was as follows: "Whereas I have, in and by my last Will and Testament bearing date the 17th of August 1812, made seve-

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ral Provisions and Bequests in favour of *Susan Harriet Hope*, Daughter of the late Rev. Mr. *Hope of Derby*, now my beloved Wife: Now I do hereby confirm such Bequests and Provisions to her, in favour of the said *S. H. Hope*, now my beloved Wife, whom I have publicly acknowledged to be my Wife by the Laws of *Scotland*, and whom I do publicly acknowledge as my Wife in *England*, and am ready to confirm the same by any other necessary legal Act; and I trust that no quibble in Law will deprive her of any of the benefits intended for her use, but that all doubtful points will be construed to her advantage and for her benefit; and I do hereby ratify and confirm this by my hand and seal, this 18th day of August 1818." The Testator died on the 18th of December 1826.

The Suit was instituted for the Administration of the Testator's Estate.—It appeared, by the *Master's* Report, that the Testator's Personal Estate was insufficient to pay his Debts and Legacies, and that the 10,000*l.* given to the Plaintiff, remained unpaid. On the hearing of the Cause for Further Directions, the question was whether the 10,000*l.* was a charge upon the *Jamaica* Estates.

*Mr. *Knight* and Mr. *Turner* for the Plaintiff: [*278]

By the first Clause in the Will, the *Jamaica* Estates are subjected to the payment of such of the Testator's Debts, and of the Legacies or Sums of Money thereafter bequeathed, as his general Personal Estate should not be sufficient to pay, or as should not be paid out of the Produce of his *Kent* Estate. In the first Codicil the Testator speaks of the 10,000*l.* as a Legacy: he says that, though he has sold the *Kent* Estate, the Plaintiff shall be paid the Legacy of 10,000*l.* There can be no doubt that the Plaintiff might have claimed to be paid that Legacy, out of the Personal Estate; and, if so, she is entitled to receive it out of the *Jamaica* Estates, in the event, which has happened, of the Personal Estate being insufficient to pay the Debts and Legacies.

The effect of the second Codicil, (which is duly attested, and in which the Testator ratifies and confirms the Bequests and Provisions which he had made in favour of the Plaintiff,) is to republish the first Codicil: so that the first Codicil, by the effect of the second, creates a charge on the *Jamaica* Estates. *Guest v. Willassy* (a), *Barnes v. Crowe* (b).

Mr. *Pepys* and Mr. *Bigg* for the Defendants Sir *Orford Gordon* and his eldest Son:

By the Will, nothing is charged on the *Jamaica* Estates, except Sums which would be payable, in the first instance, out of the Testator's general Personal Estate, and his Estate in *Kent*. The 10,000*l.* is not a

(a) 2 Bing. 429; and 3 Bing. 614.

(b) 1 Ves. 486.

1832.—Thames and Medway Canal Co. v. Nash.

[*279] Legacy. The gift of that Sum is merely a direction how *the proceeds of the *Kent* Estate should be applied : it is merely a portion of that Estate ; and there is nothing in the Will that can make it a Legacy, or payable out of the Personal Estate. The first Codicil cannot be read on this question, the object being to charge the Real Estate. The second Codicil does not refer, or in any manner, allude to the first Codicil. It refers to the Will only, and is expressly confined to the benefits which the Plaintiff was to take under that Instrument. The Case of *Guest v. Willasey* does not apply ; for there the Will and Codicils were all on the same sheet of paper. *Lady Strathmore v. Bowes* (c).

Sir *E. Sugden*, for the Defendants, the Co-heirs of the Testators :

The second Codicil does not refer to the Real Estate. An Instrument that is duly attested, cannot do more than replenish another Instrument that is also duly attested ; or it can only re-publish an Instrument not duly attested, to which it expressly refers. The second Codicil contains no reference to the first Codicil, which always was an operative Instrument. It merely makes the Will speak from the date of the second Codicil. In *Guest v. Willasey*, the Instruments being all on the same piece of paper, the Testator could not re-publish part without re-publishing the whole.

Mr. *Kindersley* and Mr. *Elderton* appeared for the Trustees.

The *Vice-Chancellor*, having asked whether the Parties wished [*280] that he should decide the question *without directing a Case for the opinion of a Court of Law, and the Counsel having replied in the affirmative, delivered Judgment as follows :

My opinion is that the second Codicil does re-publish the first. The first Codicil is part of the Will ; and, if the second Codicil is a re-publication of the Will, it is a re-publication of every thing that is part of the Will. The second Codicil does refer to the Will : it ratifies and confirms the Will, and everything that is part of it. The consequence is that the Testator's Real Estates in *Jamaica* are liable to the Payment of the 10,000 *l.* (d).

THE THAMES AND MEDWAY CANAL COMPANY v. NASH.

1832 : 7th May.—*Interpleader*.

In Interpleading Suits, it is not necessary for the Defendants to enter into Evidence, as against each other.

THIS was an Interpleading Suit. The Defendants had entered into Evidence, as against each other.

(c) 7 T. R. 482

(d) See *Pigott v. Walker*, 7 Ves. 98. See also *Money Penny v. Bristow*, 2 Russ. & Myl. 117.

1832.—Ex parte Shick.

The *Vice Chancellor* said that, in Interpleading Suits, it was necessary for Co-defendants to enter into Evidence as against each other, because the Court always directed an Inquiry to be made, or an Action to be brought, upon the Answers merely.

The *Solicitor-General* and Mr. *Spence* appeared for the Plaintiffs; and Mr. *Wray*, Mr. *Seton*, and Mr. *Turner* for the Defendants.

*EX PARTE SHICK.

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1832: 10th May.—*Practice.—Trustee.—Stat. 11 Geo. 4, and 1 Will. 4, chap. 60.*

A new Trustee appointed under 11 Geo. 4, and 1 Will. 4, c. 60, without a reference to the Master, the Petitioner being the only Person interested in the Trust Property.

A. MAXTON, by her Will, dated in April 1817, gave all her Real and Personal Estate, to one *Hunter*, in Trust to Pay the Rents, Dividends and Interest thereof, to her Daughter, *Stephania*, the Wife of *Henry Shick*, for her separate use, so long as she should continue the Wife of the said *Henry Shick*, and, in case she should survive her Husband, then in Trust for her, her Heirs, Executors, Administrators and Assigns; but in case she should die his Wife, then in Trust for such Person or Persons as she should, by Deed or Will, appoint, and, in default of Appointment, in Trust for her Heirs, Executors and Administrators.

Mrs. *Shick* presented a Petition, under 11 Geo. 4 and 1 Will. 4, c. 60, stating that she had been separated from her husband for more than 14 years; that he had been abroad for several years, and then was, as she believed, living somewhere in *Germany*: that *Hunter*, the Trustee, had gone to settle in *America*; and that she was advised that, under the 22d Sect. of the Act*, the Court *was empowered to appoint a [*282]

* That Section is as follows: "And whereas cases may occur, upon applications by Petition under this Act for a Conveyance or Transfer, where the recent creation or declaration of the Trust or other circumstances may render it safe and expedient for the *Lord Chancellor*, entrusted as aforesaid, or the Court of Chancery, (as the Case may require) to direct, by an Order upon such Petition, a Conveyance or Transfer to be made to a new Trustee, without compelling the Parties seeking such appointment to file a Bill for that purpose, although there is no power, in any Deed or Instrument creating or declaring the Trusts of such Land or Stock, to appoint new Trustees; Be it therefore further Enacted, That in any such case it shall be lawful for the *Lord Chancellor*, entrusted as aforesaid, or the said Court of Chancery, to appoint any Person to be a new Trustee, by an Order to be made on a Petition to be presented for a Conveyance or Transfer under this Act, after hearing all such Parties as the said Court shall think necessary; and thereupon a Conveyance or Transfer shall and may be made and executed, according to the provisions hereinbefore contained, to, or so as to vest such Land or Stock in such new Trustee, either alone or jointly with any surviving or continuing

1832.—In re Debary.

Trustee in the place of *Hunter*, and to direct the Trust-property to be conveyed and transferred to the new Trustee. The Petition prayed that *John Chipcase* might be appointed the new Trustee, and that the Trust-property might be conveyed to him upon the Trusts of the Will.

Mr. *Cooper*, for the Petitioner, asked that an Order might be made according to the prayer of the Petition, without a reference to the *Master*.

And the *Vice-Chancellor* made an Order accordingly, on the ground that the Petitioner was the only Person interested in the Property.

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*IN RE DEBARY.

1832: 5th June.—*Recovery*.—*Infant Trustee*.

Estates were conveyed to *A. & B.* and the Heirs of *A.* *A.* died, having devised the Estates to *C.* in Tail. *C.* alone, in *B.*'s Life-time, conveyed the Estates to *D.*, to make him Tenant to the *præcipe*, and a Recovery was suffered to the use of *C.* in Fee. *D.* died, leaving an Infant Heir. Held that the Heir was not a Trustee: for, though the Recovery did not bar the Estate Tail, it drew out from *D.* the whole Estate that was vested in him, under the Recovery-deed.

In 1784, Estates in *Kent* were conveyed unto and to the use of *Thomas Charlton* and *John Charlton*, and the Heirs and Assigns of *Thomas Charlton*, nevertheless, as to the Estate of *John Charlton*, in Trust for *Thomas Charlton*, his Heirs and Assigns. In 1793, *Thomas Charlton* died, having, by his Will dated in 1791, devised his Real Estates to his Son, *Thomas*, in Tail. By Indentures of the 31st of October and 1st of November 1800, *Thomas Charlton*, the Son, conveyed the Estates to *Richard Debary*, in Fee, to make him Tenant to the *præcipe*, for suffering a Recovery to the use of *Thomas Charlton*, the Son, in Fee. *John Charlton*, although he was found to be living on the 7th of June 1804, did not join in the Conveyance. The Recovery was suffered in Michaelmas Term 1800: and *Thomas Charlton* afterwards sold and conveyed, certain Portions of the Estates, to different Purchasers. *Richard Debary* died in 1826, intestate, leaving his four Sons, who were all Infants, his Co-heirs in Gavelkind.

The Recovery being defective (*a*), for want of a good Tenant *præcipe*, it was proposed that a new Recovery should be suffered by *Thomas Charlton*; and, accordingly, he and the Purchasers (*John Charlton* being then dead) joined in presenting a Petition to the Court, praying that the *Master*

Trustee, as effectually, and in the same manner as if such new Trustee had been appointed under a Power in any Instrument creating or declaring the Trusts of such Land or Stock, or in a Suit regularly instituted."

(a) See 3 & 4 Will. 4, c. 74, sec. 11, by which this defect is remedied.

1832.—In re Debary.

might inquire and state whether the Sons of *Richard Debary* were Infant Trustees within 11 Geo. 4 and 1 Will. 5, c. 60; [*284] and, in Feb. 1832, it was ordered that the *Master* should inquire and state in what manner the Estates were vested in the Sons of *Richard Debary*, and whether they were Infant Trustees, as to the Hereditaments comprised in the Conveyance of 1800, within the Act. The *Master* certified that it did not appear to him that the Estates, or any Part thereof, were vested in the Infants; but, in case the Court should be of opinion that any Portion of the Legal Estate in the Premises comprised in the Conveyance of 1800, had become vested in the Infants, then that they were Trustees, within the Act, for *Thomas Churlton*, as to the part of the Estates remaining unsold, and, as to the other parts, for the respective Purchasers thereof.

The Petitioners then presented another Petition, stating that they were advised that some portion of the Legal Estate in the Premises, had become vested in the Infants, and that they were Trustees, within the Act, for the Petitioners, as to their respective portions of the Estates, and praying a Declaration to that effect, and that the Infants might be ordered to convey the Estates to *J. Sheringham*, to make him Tenant to the *præcipe*, for suffering a Recovery to the use of the Petitioners in Fee, as to their respective portions of the Estates.

Mr. *Preston* appeared for the Petitioners, and said that it was the general practice of Conveyancers to require that the Tenant in a defective Recovery, if living, or, if dead, his Heir or Devisee, should join in making the Tenant for the new Recovery.

The Petition having been heard on a former day :

*The VICE-CHANCELLOR now said :

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I have read over the Petition in this matter. The *Master* has expressed it to be his opinion that no Legal Estate is vested in the Co-heirs of *Richard Debary*. The Petition, however, represents that the Parties are desirous that it should be held otherwise; but, according to my understanding of the law, the *Master* is right.

The Legal Estate was conveyed to *John* and *Thomas Charlton* and the Heirs of *Thomas*. *Thomas* died before *John*, and, by his Will, devised the Estates to his Son, *Thomas*, in Tail. *Thomas*, the Son, conveyed as far as he could, the Legal Estate, to *Debary*, to make him Tenant to the *præcipe* for suffering a Recovery to the use of *Thomas* in Fee; and a Recovery was accordingly suffered. Although that Recovery did not bar the Estate Tail, it had the effect of drawing out the Legal Estate, from *Debary*, which was vested in him for the purpose of making him Tenant to the *præcipe* (b).

(b) See *Preston on Conveyancing*, p. 86; and *Shep. Touch.* *Preston's* edition, Appendix No. 1.

1832.—Codrington v. Houlditch.

Declare that no Legal Estate is vested in the Infant Co-heirs of *Richard Debary*, and, therefore, the Court doth not think fit to make any Order on the Petition.

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*CODRINGTON v. HOULDITCH.

1832: 5th June.—*Practice*.—*Revivor*.

A. & *B.* an Infant, file a Bill. *B.* attains 21, and gives Notice to the Parties, that he repudiates the Suit, and then dies. *A.* revives the Suit. The Defendants answer the Bill of Revivor, and insist that, *B.* having repudiated the Suit, it ought not to be revived; and they then move to discharge the Order of Revivor, for irregularity. Motion refused, because the Defendants ought to have pleaded to, and not answered the Bill of Revivor.

THE original Bill was filed, in December 1830, by *Codrington*, an Adult, and *Nisbett*, an Infant, by his Next Friend. On the 4th of August 1831, and after the Defendants had put in their Answers, *Nisbett* attained twenty-one, and, thereupon, served *Codrington*, the Next Friend, and the Defendants, with Notices in writing that he repudiated the Suit. In September 1831, *Nisbett* died, upon which *Codrington* filed a Bill of Revivor against his Executors and the Defendants, and afterwards obtained the usual Order to revive. The Defendants, in their Answer to the Bill of Revivor, objected that the Suit ought not to be revived, on the ground that *Nisbett* had repudiated it, on his coming of age. The Plaintiff, *Codrington*, having given a Notice of Motion that certain Issues, which had been directed in the Cause, might be amended, the Defendants gave a cross Notice of Motion that the Order to revive might be discharged for irregularity.

Mr. *Knight* and Mr. *Bethell*, in support of the cross Motion:

By the Notices which were given by *Nisbett*, the Suit was put an end to. The Bill of Revivor prays that the Suit may be put into the same situation as it stood in at *Nisbett's* death. At his death, he had repudiated the Suit.

[*The Vice-Chancellor:—*Nisbett* never made any application, [*287] to the Court, that all proceedings in his name might be stayed.]

No such application was necessary. The Issues were directed on a joint Complaint; and that joint complaint exists. The Suit, after *Nisbett's* repudiation, could not be further proceeded in, and did not admit of being revived; and consequently the whole of this proceeding is irregular from its commencement.

Mr. *Pepys* and Mr. *Ellisson* appeared for the Plaintiff *Codrington*, and referred to *Lewis v. Bridgman* (a). Mr. *Parker* appeared for *Nisbett's* Executors.

(a) *Ante*, Vol. II. p. 465.

1832.—Att. Gen. v. Mer. Tailors Co.

The VICE CHANCELLOR :

The Defendants did not demur to plead to the Bill of Revivor, but they answered it. The putting in of an Answer to a Bill of Revivor, is a sufficient submission to have the Suit revived, and, notwithstanding anything that may be contained in the Answer, it is a matter of course to draw up the Order to Revive. Any set of circumstances that might form a reason why the Suit should not be revived, might and ought to have been brought forward by way of Plea. My opinion, therefore, is that the Motion to discharge the Order to Revive, is wrong, and that it ought to be refused with Costs.

*THE ATTORNEY-GENERAL v. THE MERCHANT TAILORS COMPANY. [*288]

1832: 5th and 6th June.—*Information.—Pleading.—Multifariousness.—Parties.*

A Charity Information relating to several small Sums given to a Company, by different Donors, to be lent to different Members of the Company, is not Multifarious. And, though the Interest of one of the Sums is payable to another Company, that Company is not a necessary Party to the Information: but this was reversed on Appeal.

A Demurrer for Multifariousness, to an Information, will not be allowed, because it contains general, sweeping Charges, but the Court will direct a reference to the Attorney-general, to prevent the Defendants from being unnecessarily harassed by those Charges.

THIS Case is reported, on the Appeal, in 1 *Mylne & Keen*, 189. The Information, in addition to what is there stated, contained the following Charges, which were relied upon, in support of the Demurrer for Multifariousness: That divers *other Gifts*, by way of Bequest and otherwise, had been, from time to time, made to the Company, and that divers *other Sums of Money, or other Funds and Property*, had been, at some former time or times, vested in the Company for the time being, and were then vested in the Defendants, on Trust to lend out the same to Freemen of the Company, or upon some other like or corresponding Trust, for the benefit and advancement of Freemen in Trade or Business: That the Defendants had in their custody divers Deeds, Wills, and other Writings relating to the before-mentioned Sums of Money, and other the matters and things aforesaid, a List or Statement of all which the Defendants ought to set forth in a Schedule, to the end that the same might be produced and deposited in the hands of their Clerk in Court for the inspection of the Relator.

The Information prayed that the Defendants might make a full discovery touching the several matters aforesaid, and that it might be declared that the Defendants were chargeable with the several before-mentioned Sums of 100*l.*, &c. and other the Gifts aforesaid, [*289]

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if any, and that the same ought to be applied and made available according to the intentions of the several Donors thereof, and that the defendants might be ordered to account for the same.

Mr. *Knight* and Mr. *James Russell*, for the Demurrer.

Sir *E. Sugden* and Mr. *O. Anderdon*, for the Bill.

The VICE-CHANCELLOR:

In my opinion this Demurrer ought not to be allowed.

These eight Charities are so directed to the same objects, that it would be improper to file separate Informations as to them. The first Sum, so far as any Benefit is to be derived from it, is—[His Honor here stated the objects for which the eight Sums were to be applied.]—Therefore these eight Sums are, mainly and substantially, for the same objects; and it appears, upon the Information, that, owing to the minuteness of the Sums, each of them could not be administered as the Donors pointed out; and, therefore, it appears to me that the Court ought, at the hearing, to deal with them conjointly. I therefore think that this Information is not multifarious.

With respect to the objection for want of Parties, as to the first Sum, there is a definite benefit given to The *Mercers' Company*; and no Decree that can be made on this Information, as to that Sum, can affect the Interest of the *Mercers' Company*. My opinion therefore is, that this is a proper Information, and that the Demurrer ought to be overruled.

[*290] *As to the sweeping Charges in the Information, the Court will, as was done in the Case of The *Corporation of Carlisle* and other Cases, prevent the Corporation from being harrassed by any oppressive inquiry founded on those Charges (a).

GRIGBY v. POWELL.

1832: 8th & 9th June.—Will.—Construction.—Apportionment.—Rent-charge.

A., on his Marriage, grants a Rent-charge, to his Wife, out of his Estates, for her Jointure; which he secures by a Term limited to Trustees. By his Will, he gives his Mansion-house and Park, to his Wife, for Life, and the rest of his Estates, to B., and directs that the Repairs, Painting, &c. of his Mansion-house shall be paid for, by sale of Timber on the Premises devised to B., and then he confirms the Settlement. Held that the Jointure is wholly raiseable out of those Premises.

JOSHUA GRIGBY, Esq. deceased, the late Husband of the Plaintiff, being seised in Fee of a Mansion-house, Park and Lands, in *Drinkston*, in *Suffolk*, which he occupied, and of three Farms in *Drinkston*, *Hesset* and

(a) See *Ante*, Vol. IV. p. 275, and see post. 323.

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Hawstead, in the same County, which he let to different Tenants, by the Settlement previous to his marriage with the Plaintiff, dated in December 1826, conveyed all the before-mentioned Hereditaments to Trustees in Fee, to the use, after the marriage, of himself for life, and, after his decease, to the use that the Plaintiff, in case she should survive him, should, immediately after his decease, receive, thereout, a Rent-charge of 1,000*l.* per Annum, for her life, free from all Taxes and Deductions whatsoever, Parliamentary or otherwise, of any nature or kind, the same to be for her Jointure, and in lieu of Dower and Thirds, with the usual powers of distress and entry; and, subject thereto, to the use of Trustees, for 99 years, to commence on the decease of *Joshua Grigby*, upon the usual Trusts for "better securing the Rent-charge, and, subject thereto, [*291] to the use of *Joshua Grigby* in Fee.

Mr. *Grigby* made his Will, dated the 10th of February 1829, in the following words: "I direct that all my just Debts be paid. I give and devise, unto my Wife, *Anna Grigby*, and her Assigns, for and during the term of her natural life, all that my Mansion-house, with the Yards, Gardens, Stables, Coach-houses and Appurtenances, now in my own occupation, at *Drinkston* aforesaid, and also all that my Park thereto: and I direct that Trees and Timber shall be cut down off my Estates in the parishes of *Hawstead*, *Hesset* and *Drinkston*, and sold to pay the Expenses of any Repairs, Painting or Glazing, which' in the opinion of the said *Anna Grigby*, shall, at any time, be required for any of the said Hereditaments so given and devised to her, for life, and also for the Expense of Insurance of the same Premises from Fire, which I direct shall be done, and that my Nephew, *John Harcourt Powell*, or his Heirs, Executors or Administrators, shall point out, at proper times, what Trees shall be felled for those purposes, and, if he or they neglect or refuse to do so, for one month after notice in writing shall be given to him or them, then the said *Anna Grigby* shall cause to be cut down, and sell such Trees as she shall think proper for those purposes. And I confirm the Settlement made on my marriage with my present Wife. And I give and devise, and direct to be paid out of all the rest of my Real Estates in *Suffolk*, unto my Sister, *Charlotte Grigby*, during her life, 220*l.* a year, to be paid by equal Payments, the 1st day of January, April, July and October, free of all charges. I direct that a *yearly [*292] Sum of 15*l.* be paid, by the aforesaid Payments, to the Widow of *Thomas Eaves*, my Bailiff, for her life, and that she be permitted to live without rent, in the House she now resides in. And, subject to those two Annuities and other conditions above specified, I give and devise all my Real Estates in *England*, from and immediately after my death, and also all the abovementioned Hereditaments so given to my said Wife for her life, from

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and after her decease, unto my said Nephew, *John Harcourt Powell*, his Heirs and Ass'ns, for ever. And I direct that all my Paintings and Portraits, in my House at *Drinkston*, be enjoyed with the same by my Wife, for life, and, after her death, to go with the House: and, subject to the payment of my Debts, and the Expenses of carrying this my Will into Effect, I give and bequeath all my Household Furniture, Plate, Linen, China, Wines, Stores, and all the rest, residue and remainder of my Personal Estate and Effects whotsoever, and of every kind, unto my said Wife, *Anna Grigby*, for her own sole use and benefit; and I nominate and appoint my said Wife, and my said Nephew, *J. H. Powell*, Executrix and Executor of this my Will."

The Testator died on the 6th of March 1829. *Charlotte Grigby* died in March 1831.

The Bill insisted that, in consequence of the Testator having devised the Mansion-house and Park to the Plaintiff, no part of the Jointure ought to be raised or paid thereout, but that it ought to be wholly raised out of the other Estates in the Settlement, and, if the Rents thereof were [*293] insufficient to pay the Jointure, that *the deficiency ought to be raised by Mortgage of those Estates: and the Bill prayed for a declaration to the same effect, and for relief accordingly.

The Defendant, *J. H. Powell*, in his Answer, said that the Testator did not intend that the whole of the Jointure should be raised and paid out of such parts of the settled Estates as were not devised to the Plaintiff, because he well knew the rental and value of his Property, and that the Rents thereof, exclusive of the Mansion-house and Park, were not sufficient to pay the Jointure: and he submitted that all the Property in the Settlement, including the Mansion-house and Park, ought to contribute rateably to the Payment of the Jointure.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiff:

The Testator intended that his Wife should have his Mansion-house and Park, free from all Expense. He expressly confirms the Settlement on his marriage, and provides for the Expenses of Repairs, Painting, Glazing and Insurance. She cannot be considered to have the subject of the Devise, free from Charges, if she is to take it subject to the Rent charge. The Testator intended her to have the 1,000*l.* a year, and the House and Park, and that she should have the latter free from all Reprizes, much more, free from all Incumbrances. He meant to place her in the same situation, with respect to the House and Park, as he stood in himself: and he was not subject to the Rent-charge. The Devise to the Nephew is in the following words: "And subject to those two Annuities, &c." So that the Nephew is to have no benefit, till the death of the Wife, of the Estates devised to

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her ; but he is, indirectly, *attempting to get a benefit. *Knight* [*294] v. *Calthorpe* (a). That is not so strong a Case, in favour of the Widow, as the present ; for it does not appear that the Testator confirmed the Settlement, by his Will.

Mr. *Knight*, Mr. *Preston* and Mr. *Rolfe*, for the Defendant, *J. H. Powell* :

The mere fact of Devise, does not imply an exemption from the Incumbrance. The Devisee takes the Estate with all its charges, and, unless there be special words, the portion of the Property devised, is not exempted from contribution. The Testator has not done enough to throw the entire burden upon the other parts of the Estates. There is not language enough in this Will, to create a new Rent-charge. The Gifts of the Annuities to the Sister and Baliff's Widow, show that the Testator had present to his mind the expressions which were necessary to throw a charge on any particular portion of his Estates, and, if he had intended that his Wife should have the Mansion-house and Park, free from the Rent-charge, he would have said that it should come out of the other parts of his Estates, as he has done with respect to the Annuities to his Sister and the Baliff's Widow. The words " I confirm the Settlement made on my marriage," were used in order to prevent the Rent-charge from being extinguished at Law by the Acceptance of the Devise (b).

[The *Vice-Chancellor* : The intervention of the Term prevents the Rent-charge from being defeated.]

The Term was created merely for further securing the Rent-charge whilst legally subsisting. The Settlement *makes the [*295] Rent-charge issue out of the Mansion-house as well as the other settled Property. Then what does the confirmation of the Settlement amount to ? It preserves the Rent-charge in a Court of Equity, and sets up the Settlement as it stood, and does not make the Rent-charge issue out of any particular part of the settled Estates. Besides, words of confirmation similar to those in this Case, are frequently used by Testators as mere words of course, and without any particular object. When the Testator devises the part of his Estates which is charged with the two Annuities, to his Nephew, he devises it, expressly, subject to those two Annuities ; he, therefore, evidently intended that those two Annuities were all that his Nephew was to be subject to under the Will. The omission to charge the Rent charge on the other parts of the Estates, shows that it was the testator's intention that the Mansion-house and Park should be subject to it. It is making a Will for the Testator by conjecture, to say that the Rent-charge is to be

(a) 1 Vern. 347.

(b) See Co. Litt. 147 b.

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raised exclusively out of the parts of the Estate not devised to the Wife. The Provisions as to Repairs, &c., shows that the Estate was a scanty security for the Rent-charge, and that the Wife had the whole value of it in the Rent-charge. Is it to be imputed, to the Testator, that he intended that the Trustees of the Term should, *de anno in annum*, Mortgage the Estate to raise part of the Rent-charge?

Knight v. Calthorpe is not Law (c). There, no Term was created for securing the Rent-charge; the Widow, by her own act in accepting the Devise, had extinguished the Rent charge, and yet The Lord Chancellor says that she might distrain, in all or any part of the Lands, for her Rent. In Sergeant Hill's Copy of Eq. Ca. Ab., there is written the following observation on that Case, in the margin of the page in which it is contained: "This Case is not correct upon principle."

The VICE-CHANCELLOR:

The Testator appears, on the face of his Will, to have been conusant that his Wife was entitled to a Rent-charge of 1,000*l.* a year, under his Settlement. He gives to her his Mansion-house and Park, which, ordinarily speaking, do not produce profit: and, on the face of his Will, he shows a clear intention, not only that she shall have the Mansion-house and Park, but that she shall take them in an unusually beneficial manner, and exempt from all Charge; for he directs that the Repairs, Painting, Glazing and Insurance shall be done at the Expense of the other part of his Estate, as his Wife shall think proper. Then he uses the following words: "And I confirm the Settlement made on my marriage with my present Wife." Admitting that the mere effect of the Devise would be to extinguish part of the Annuity, no other effect can be attributed to these words, except that of giving, to the Wife, the 1,000*l.* a year; and the inference is, that he intended that she should have the 1,000*l.* a year, in addition to the Mansion-house and Park. It appears to me that there is no other mode of construing this Will, than by giving, to the Wife, the double benefit.

The Will, in *Knight v. Calthorpe*, bears a strong resemblance to the one in this Case. But there are words in this Will, which are not found in that, and which enable me to put that construction upon this Will which I have mentioned.

I am of opinion that this Lady is entitled to have the Rent-charge of 1,000*l.* a year, wholly raised out of those parts of the Estates which are not devised to her.

(c) See *Rushout v. Rushout*, 6 Bro. P. C. 89, and *Chester v. Willes*, Amb. 247.

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WHARTON v. LORD DURHAM.

1832: 21st, 23d and 26th November.—*Portions.—Satisfaction.*

W. Bequeathed 5,000*l.* to the Daughter of his Brother *J.* charged on his Real Estates, and directed the Interest to be raised for her Maintenance, if *J.* should so direct; and he devised his Real Estates so charged, to *J.* in Fee. *J.* bequeathed 10,000*l.* in Trust for his Daughter for life, and after her death, in Trust for her Children, and declared that that Sum should be in addition to the Sums which she was entitled to under *W.*'s Will. The Daughter afterwards married. Her Father advanced to her Husband 15,000*l.* as his Daughter's Marriage Portion, and, by the Settlement, Pin-money and a Jointure for the Wife, and Portions for the younger Children of the Marriage, were provided out of the Husband's Property, and the 15,000*l.* was declared to be in satisfaction of the Sums which the Wife was entitled to under *W.*'s Will. Held that the 10,000*l.* was not satisfied by the Marriage Portion.

WILLIAM LAMBTON, Esq. by his Will, dated in 1772, devised his Real Estates to Trustees, for 1,000 years, in Trust to raise 15,000*l.*, which he directed to be equally divided amongst his Nephew and Nieces, *Ralph John Lambton, Susan Mary Ann Lambton* and *Jane Dorothy Lambton*, at the usual periods: and, until their Portions should become payable, he authorised the Trustees to raise yearly, for their maintenance and education, any Sums not exceeding the interest at 3*l.* per Cent. of their respective Portions, in case their Father should direct it to be raised; and, subject thereto, he devised his Estates to his Brother, *John Lambton*, in Fee.

* *John Lambton*, by his Will, dated the 17th of November [*298] 1788, gave 10,000*l.* to Trustees, one half to be paid at the end of three years, and the other half at the end of six years after his death, with 4*l.* per Cent. Interest from his decease, in Trust, with the consent of his Daughter, *Susan Mary Ann*, to invest the 10,000*l.* in the usual Securities, and to pay the Interest to her, for life, and, after her death, to pay the Capital unto and amongst all and every her Child and Children, in such Shares, at such times, and under such restrictions, as she, whether coverte or sole, should, by Deed or Will, appoint, and, in default thereof, to pay the same amongst all and every her Child or Children equally; the Shares of sons to be vested at 21, and the Shares of Daughters at 21 or marriage, and to be paid to such of her Sons as should be under 21 at her death, when they should attain 21, and to such of them as should attain 21 in her life-time, at the end of six months after her death, with Interest from her death, and the Shares of Daughters to be paid to such of them as should be under 21 and unmarried at her death, at their ages of 21 or days of marriage, and, to such of them as should attain 21 or be married in her life-time, at the end of six months after her death, with Interest from her

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death: and the Testator directed the Trustees, after his Daughter's death, to apply the Interest of the Shares, for the Maintenance and Education of her Children, until their Shares should become payable. And he authorized the Trustees, at any time or times, during the life of his Daughter, with her consent in writing, to apply such part of the 10,000*l.* as she should direct, for the benefit and advantage of her Child or Children, as she should direct, notwithstanding their portions should not have become

[*299] payable, and also, at any time *after the decease of his Daughter, to apply any part of the Portions of her Sons, for their advancement, notwithstanding the same should not have become payable: and he provided that, if his Daughter should have no Child, or if she should have Children, and her Sons should die under 21, and her Daughters under 21 and unmarried, the 10,000*l.* should fall into the Residue of his Personal Estate.

The Testator then gave another Sum of 10,000*l.* upon similar Trusts, for the benefit of his Daughter, *Jane Dorothy*, and 35,000*l.* on certain Trusts for the benefit of his Son, *Ralph John*, and declared that the Sums so given in Trust for his Son and Daughters, were over and above the several Sums of 5,000*l.*, 5,000*l.*, and 5,000*l.* devised to them by the Will of his Brother, *William Lambton*; and he gave the Residue of his Real and Personal Estate, charged with the payment of his Debts and Legacies in aid of his Personal Estate, to his Son, *William Henry*, for life, with Remainders to his first and other Sons in Tail Male, with Remainders over, and he bequeathed the Residue of his Personal Estate to his Son *William Henry*, and appointed him sole Executor of his Will.

By Articles previous to the marriage of *Susan Mary Ann Lambton* with the Plaintiff *John Wharton*, Esq., dated the 9th of October 1790, after reciting that it had been agreed that, in consideration of 15,000*l.* which *John Lambton* had agreed to give to *J. Wharton*, as the Marriage Portion of his Daughter, *J. Wharton* should secure to her, during their joint lives, the annual Sum of 500*l.*, for Pin-money, and should also secure to her

a Jointure of 1,200*l.* per annum, and should also secure such

[*300] *Portions for the Daughters and younger Sons of the marriage as thereafter mentioned, and it appearing, from the situation and circumstances of *J. Wharton's* Property, to be inexpedient to make an actual Settlement to the effect agreed on, till after the death of Mrs. *Margaret Wharton* and Mrs. *Ann Farquharson*, (two of his Aunts,) that it had been agreed that *Wharton* should enter into the Covenants thereafter contained, and that the payment of the 15,000*l.* should be postponed in the manner thereafter mentioned, and that, in the mean time, that Sum should be subservient to the purposes of the intended Settlement in manner there-

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inafter mentioned: *J. Wharton*, in consideration of the marriage and of the 15,000*l.* thereafter covenanted to be paid by *John Lambton*, covenanted with *William Henry Lambton* and *Ralph John Lambton*, that, in case the marriage should take effect, he would pay 500*l.* per annum to *Susan Mary Ann Lambton*, during their joint lives, for her separate use, and that, within six months after the death of *Mrs. Margaret Wharton*, if *Susan Mary Ann Lambton* should be then living, he would further secure that Sum as the Trustees should require, and also that he would, in like manner, secure to *Susan Mary Ann Lambton*, during her life, in case she should survive him, an Annuity of 1,200*l.*, commencing from his death, and further that he would secure, within six months after the death of *Mrs. Ann Farquharson*, upon Estates either in *Yorkshire*, *Durham* or *Northumberland*, or upon Government or Real Securities, the Sums of Money after mentioned, for the Portions of all the Children of the marriage, except an eldest or only Son, that is to say, if there should be only one such Child, if a Son, 30,000*l.*, but if a Daughter, 20,000*l.*, to be vested in and payable to a Son at 21, and a Daughter *at 21 or marriage, if [*301] such times of payment should happen after the death of *John*

Wharton, but if in his life-time, then the payment to be postponed till six months after his death, and to carry Four per Cent. Interest in the mean time: and, if there should be two or more such Children, then the 30,000*l.* to be for their Portions, and to be divided amongst them in such Shares as *J. Wharton* and *Miss Lambton* should appoint, and, in default thereof, to be equally divided amongst them, and to be vested in and payable to them at the times before mentioned, but in case *Wharton* and *Miss Lambton* should, during their joint lives, direct any part of the vested Portions to be raised and paid in his, *Wharton's*, life-time, the same should be raised and paid accordingly, and that, after *Wharton's* death, the Trustees should have power to apply, out of the Rents of the Estates, or out of the Interest of the Funds charged with the Portions, such Sums as should be necessary for the maintenance and education of the Children until the Portions should become payable, not exceeding the Interest of their Portions at Four per Cent. per Annum; and that, in case any younger Son should die under 21 or become an eldest or only Son, before his Portion became payable, or any Daughter should die under 21 and unmarried, then that such Child's portion, as well original as accrued, should accrue to the survivors, and be vested and paid at the same times as the original Portions; and, if there should be but one such surviving or other younger Child, then such only younger Child, if a Son, should be entitled to the whole of the Portion or Portions of the Children so dying, or such younger Son becoming an eldest or only Son, as the case should happen, but, if a Daughter, then

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[*302] only to so much thereof as, *together with her original Portion, would make up 20,000*l.* And *Wharton* covenanted that in case he should die before the Jointure and Portions were secured, all the Estates of which he should, at his death, be seised in Fee, should stand charged therewith until the same should be effectually secured by his Heirs. And *J. Lambton* covenanted that, if *Wharton* should, in the life-time of Miss *Lambton*, perfect the Securities for the Annuities of 500*l.* and 1,200*l.*, or if Miss *Lambton* should die in *Wharton's* life-time, he, *John Lambton*, would pay the 15,000*l.* to *Wharton*, as and for the Marriage Portion of his Daughter, immediately on the perfecting of the Securities or the death of Miss *Lambton*, which should first happen, and that he would pay, to *Wharton*, Interest at 4*l.* 10*s.* per Cent. until the Principal should become payable upon either of the events aforesaid, but if *Wharton* should die before perfecting the Security for the 1,200*l.* per annum, leaving Miss *Lambton* surviving, that then the 15,000*l.* should not be paid until her death, and the Interest thereof, from *Wharton's* death, should be paid to her towards the discharge of the 1,200*l.* per annum. Provided that if the Heirs, Executors, Administrators or Assigns of *J. Wharton* should, after his death, make a sufficient security for the Jointure and Portions, then the 15,000*l.* should, with Miss *Lambton's* consent in writing, be paid to *Wharton's* Executors or Assigns. And it was thereby agreed and declared by all the Parties thereto, and especially by *John Lambton*, *John Wharton* and Miss *Lambton*, that the said Portion or Sum of 15,000*l.*, was in full satisfaction and discharge of all and every the sums and sum of Money which Miss *Lambton* was, or could claim to be entitled to by virtue of any

[*303] Gift, Bequest or Devise in or under the Will of *her Uncle *William Lambton*, and that the Jointure was in lieu of Dower.

The marriage was solemnized on the 14th of October 1790; and, on that day, Mrs. *Wharton* attained 21. Mrs. *Margaret Wharton* and Mrs. *Ann Farquharson* having died, Mr. *Wharton*, on the 21st of August 1793, made a Settlement in strict conformity to the Articles, and containing the same declaration as to the satisfaction of Mrs. *Wharton's* claims under her Uncle's Will, and a Covenant, by *Wharton*, with *John Lambton*, that he, *Wharton*, would, at any time thereafter, do any act that might be necessary for releasing all and every the sums and sum of Money which he or his Wife were entitled to by virtue of any Devise or Bequest in or under the Will of *William Lambton*: and, on the execution of the Settlement, *J. Lambton* paid the 15,000*l.* to Mr. *Wharton*.

John Lambton died in 1794, whereupon his Son, *William Henry*, entered into the possession of his Real Estates under his Will. *William Henry Lambton* died in November 1797, leaving the Defendant, *John George*,

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(who was afterwards created Earl of *Durham*) his only Son, who thereupon became Tenant in Tail Male of the Estates devised by the Will of *John Lambton*.

Mr. and Mrs. *Wharton* had Issue two Daughters only, *Susan* and *Margaret*. *Susan* attained 21 in 1813, and died intestate and unmarried in 1820; and her Father took out Administration to her. *Margaret* attained 21, in 1815, and, in the same year, married *Thomas B. Leonard, Esq.* She died in 1818, without Issue, and her Husband took out Administration to her. Lord *Durham* having barred the Entail [*304] created by the will of *J. Lambton*, agreed, in 1826, to sell part of the Estates to Lord *Eldon*. The Conveyancer who advised on the Title for Lord *Eldon*, required either a Release or an Indemnity to be given in respect of the Legacy bequeathed in Trust for Mrs. *Wharton* and her Children, by her Father's Will. This led to a communication with Mr. and Mrs. *Wharton*, whereby they, at the latter end of 1826, first gained a knowledge of the Bequest, and, on the 22d July 1829, they filed the Bill in this Cause against Lord *Durham*, Mr. *Leonard*, and the Personal Representatives of *J. Lambton* and *W. H. Lambton* and of the surviving Trustee of the Legacy, charging that the Plaintiff (and which was supported by Evidence) was her Father's favourite Child: that the 15,000*l.* which was paid, by *J. Lambton*, to Mr. *Wharton*, in pursuance of the Articles, was not intended to be a satisfaction of the Legacy: that the 15,000*l.* was paid to Mr. *Wharton*, for his own use, and that neither Mrs. *Wharton* nor her Issue derived any benefit therefrom: and praying that the Trusts of *J. Lambton's* Will, especially such as concerned the raising and investing of the 10,000*l.* and Interest, might be carried into effect.

The Defendant, Lord *Durham*, by his Answer, admitted that the Legacy had not been paid, and that he had received Assets, from his Father's Personal Estate, sufficient to pay the Legacy: but he insisted that the Plaintiffs had been guilty of great laches in not applying to *W. H. Lambton* or his Executors, for payment of the Legacy out of *J. Lambton's* Personal Estate; and that it clearly appeared, by the Articles, that it was the intention of the Parties thereto, that 10,000*l.*, part of the [*305] 15,000*l.* given as the Marriage Portion of Mrs. *Wharton*, should be a satisfaction of the Legacy.

Sir *Edward Sugden*, Mr. *Knight* and Mr. *W. Pole*, for the Plaintiffs:

In order to raise a question of Satisfaction, both the funds must go to the same Parties. A Legacy to a Parent may, indeed, be satisfied by a Settlement on the marriage of the Parent, extending to the Issue: but this is the converse of that Case. The 15,000*l.* was not settled, but was paid to Mr. *Wharton*. Although the Articles provided that the 15,000*l.* should be a

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security for the Pin-money and Jointure until *Wharton* perfected the Settlement, it was, in no case, to be a security for the Portions, which were to be raised out of other Funds. There is no Case in which a Sum Paid to a Parent, has been held to be a satisfaction of limitations to his Issue.

The Provisions made for Children, by the Will and by the Settlement, differ, in many respects, from each other. By the Will, the power of appointing the Shares, is given to the Wife alone; by the Settlement, it is given to the Husband and Wife; and, therefore, the mind of the Husband would control the will of the Wife. By the Will, the 10,000 *l.* is settled on the Wife and Children, without the interposition of any interest in the Husband, so that the Father's existence would have no effect on the Children's Portion. By the Settlement, the payment of the Portion is postponed till after the Father's death. All the Children of every marriage which Mrs. *Wharton*

might contract, would be entitled to shares of the 10,000 *l.*; but [*306] by the Settlement, Portions are provided for the younger Children only of the marriage: an eldest Son takes no share; and, if there had been an only Son, nothing would have been to be raised. Suppose that *Wharton* had died soon after the marriage, without Issue, leaving his Wife surviving, and that she had married again and had Issue, then there would have been no conflict; for there would have been nobody to claim the Portions provided by *Wharton*. On what principle is it that the eldest Son of Mr. and Mrs. *Wharton*, or her Issue by a subsequent marriage, are to be excluded from participating in the Legacy, by a provision made for other persons, from which they derive no benefit.

At the date of the Settlement, large arrears of Interest were due on the Legacy of 5,000*l.* given, to Mrs. *Wharton*, by her Uncle's Will. *John Lambton*, by his Will, expressly declares that the Sums which he had given in Trust for his Son and Daughters, were to be in addition to the Legacies given to them by his Brother's Will. By the Settlement it was expressly agreed, between the Parties, that the 15,000*l.* should be in satisfaction of all Sums which Mrs. *Wharton* was, or might claim to be entitled to under her Uncle's Will: so that, by paying the 15,000*l.*, *John Lambton* discharged himself from the liability to pay the 5,000*l.* and the arrears of Interest. A bargain made with a Child for one purpose, cannot be used for another purpose; what is given expressly in discharge of one claim, cannot be extended to discharge another claim.

The eldest Son takes nothing but land under the Settlement: and Real Estate cannot be a satisfaction of a Legacy of Personalty. There [*307] is no such doctrine as partial satisfaction; consequently, as the eldest Son's claim is not satisfied, the claims of the younger Child-

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ren must remain unaffected. *Baugh v. Read* (a), *Alleyn v. Alleyn* (b), *Bell v. Coleman* (c), *Mathews v. Mathews* (d), *Roome v. Roome* (e), *Burgess v. Mawbey* (f), *Drew v. Bidgood* (g).

It is proved that Mrs. *Wharton* was her Father's favourite Child: that is the reason why he made a larger provision for her, than he did for his other Daughter. The delay in prosecuting the claim, is satisfactorily accounted for; as the plaintiffs knew nothing of the Legacy until 1826. Time is not insisted on as a bar; and Lord *Durham*, by his Answer, admits that neither Principal nor Interest has ever been paid. He rests his defence on the ground of satisfaction only, insisting that the Legacy never was payable. Mrs. *Wharton* is a married Woman; and therefore, time could not run against her, and the interests of the Children are not yet come into possession. *Parker v. Ash* (h), *Lee v. Brown* (i), *Drewe v. Bidgood* (k), *Hanbury v. Hanbury* (l), *Pickering v. Lord Stamford* (m), *Chalmers v. Bradley* (n). The Plaintiffs are entitled to Interest on the 10,000*l.*, from the death of *John Lambton*. *Stackhouse v. Barnston* (o), *Monypenny v. Bristow* (p).

*Mr. *Rolfé*, for the Defendant *Leonard*:

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Mr. *J. Lambton* did not stand in *Loco Parentis* to the Party for whom I appear. The question of satisfaction never can arise except between Persons who stand to each other in the relative situations of parent and child. Why is not my Client to remain in the situation of a Legatee under the Will of *J. Lambton*? Is he to be deprived of the benefit to which he is entitled in right of his Wife, because something has been given to another person. If Mrs. *Leonard* had been a Daughter of Mrs. *Wharton* by a second marriage, she would have taken nothing under the Settlement.

The *Solicitor-General*, Mr. *Pepys* and Mr. *Stephenson*, for the Defendant Lord *Durham*:

There is no foundation for saying that Mrs. *Wharton* was her Father's favourite Child. The Witness who has been examined to prove that allegation, says that he never heard *J. Lambton* express any particular affection for any one of his Children in preference to the others, and that he does not recollect any particular circumstance relating to the matter in question, but merely that the general impression of his mind was that she was her Father's favourite Child. By the Will, the two Daughters are equally provided for. *John Lambton* was aware that the Real Estate of which he was seised in Fee, was liable to the payment of the two sums of 5,000*l.*, to

(a) 3 Bro. C. C. 191, and 1 Ves. Jun. 257. (b) 2 Ves. jun. 37. (c) 5 Madd. 22.

(d) 2 Vez. 635. (e) 3 Atk. 181. (f) 10 Ves. 319. (g) 2 Sim. & Stu. 424.

(h) 1 Vern. 256. (i) 4 Ves. 362. (k) 2 Sim. & Stu. 424.

(l) 3 Bro. C. C. 352. (m) 2 Ves. jun. 272 and 581. (n) 1 J. & W. 51.

(o) 10 Ves. 467. (p) 2 Russ. & Myln. 117.

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which his Daughters were entitled under his Brother's Will. He intended that each of them should have a Portion to the amount of 15,000*l.*, and no more, and that those Portions should be made up of the sums of 5,000*l.*, and of the Legacies of 10,000*l.* which he gave to them ; and he disposes of all the remainder of his Property, to other Persons. In [*309] "both Wills, the Legacies to the Daughters are called "Portions." Throughout the Articles, the 15,000*l.* is spoken of as "the Marriage Portion" of Mrs. *Wharton*. Can she then be entitled to a double Portion ? She came of age on the day of her marriage, and was therefore capable of binding herself by Contract, and she did contract to take the 15,000*l.*, as her Marriage Portion, and purchased, with it, the provisions made for herself and her Issue by the Settlement, and, consequently, it is a satisfaction of the Portion under her Father's Will.

In cases of this nature, the only question is whether both Sums are intended for the same purpose : if, as is clearly the case here, they are both dealt with so as to be applicable to the purposes of a Marriage Portion, then it is a case of satisfaction. It is not necessary that both the Sums should be of the same amount, or, if one is given absolutely, that the other should be so given : and it makes no difference, that there is a slight variation as to the mode in which the Issue are to enjoy the benefits provided for them.

It appears, from the declaration in the Will of *J. Lambton*, that he was acquainted with the doctrine of satisfaction ; and therefore he did not consider it necessary to revoke the Legacy of 10,000*l.* which he had given to Mrs. *Wharton*, or to extend the declaration in the Settlement so as to include, in terms, that Legacy. He knew that the rule of Law would do that for him ; and, therefore, he was silent. But the 5,000*l.* given by his brother's Will, would not have been satisfied by the Gift on the marriage, and therefore an express declaration was introduced as to that Sum.

[310] "No interest was payable on the Legacies of 5,000*l.*, unless *John Lambton* required it, and no such requisition is shown to have been made. Can it be said that he did not intend to give his Daughter anything, but merely to buy up her claim to the 5,000*l.* It is plain, from the Articles, that 5,000*l.*, part of the 15,000*l.*, was intended to be in satisfaction of the Legacy of 5,000*l.*, and that the remainder was a Gift.

Mrs. *Wharton* came of age on the day of her marriage : that is an answer to the argument founded on her disability to sue. Whether she did or did not know of the Provision made for her by her Father's Will, cannot be proved ; but the strong presumption in Law is that she did know of it ; and it appears that Mr. *R. J. Lambton*, with whom the Plaintiff covenants, in the Articles, and who is a Trustee of the Settlement, was present when the Will was read over after the Testator's death.

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Monck v. Lord Monck (q), *Ex parte Dubost* (r), *Trimmer v. Bayne* (s), *Ward v. Lant* (t), *Hartopp v. Hartopp* (u), *Clarke v. Burgoine* (x), *Freemantle v. Bankes* (y).

[The *Lord Chancellor* :—No Case has been cited, in which a Legacy settled, by a Will, on a Child and its Issue, has been held to be satisfied by a Sum paid to that Child. Here there is a difference as to the *Persons* *who are to receive the payment. It is not like the [*311] Case where there is a difference as to the *time of payment* only. Suppose *John Lambton* had given 5,000*l.* to his Daughter, and 1,000*l.* to each of her Children, would the 15,000*l.* have been an ademption of the Children's Legacies. A Settlement of a Sum of Money on *some* of the Children of a Child, cannot be said to be the same as a Settlement on *all* the Children of that Child.]

Mr. *Barber* for Sir *Charles Loraine*, the Representative of the surviving Trustee of *J. Lambton's* Will.

Mr. *L. Lowndes* for the Defendant, *R. J. Lambton*, the surviving Executor of *W. H. Lambton*.

Sir *E. Sugden*, in reply :

If Mr. and Mrs. *Wharton* had known of the Legacy, there could be no motive for their not claiming it. Though *R. J. Lambton* was present at the reading of the Will, he was not a Trustee or Executor under it: he had not to pay the Legacies.

The argument for the Defendant, Lord *Durham*, is founded on mistake. Mrs. *Wharton*, at the date of Settlement, was not entitled to the Portion under her Father's Will. The doctrine of satisfaction is not founded on contract between the Parent and Child, but on the intention of the Parent to give one subject in lieu of another. Mrs. *Wharton* could not enter into any contract respecting the Legacy, over which she had no power, and which her Father might have revoked. However, he never did revoke the Legacy, though he lived several years after the marriage. The 15,000*l.*, was paid on a contract; and the consideration for *that [*312] payment was the release of the 5,000*l.*, and the Provisions made, by the Settlement, for Mrs. *Wharton* and the Children of the marriage.

The question of Satisfaction never arises, except between Parent and Child, or a Person who stands in *Loco Parentis*. *J. Lambton* never stood in *Loco Parentis* to his Daughter's Children.

If Mr. *Wharton* had died without Issue, and Mrs. *Wharton* had married again, and the Children of the second marriage had filed a Bill to have the 10,000*l.* raised, could it be said that they had received satisfaction for their

(q) 1 Ball & Beat. 298.

(u) 17 Ves. 184.

(r) 18 Ves. 140.

(x) 1 Dick. 353.

(s) 7 Ves. 508.

(y) 5 Ves. 79.

(t) Prec. Cha. 182.

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Shares of that Sum. We must consider this Case, not as the events have happened, but as they might have happened.

The VICE-CHANCELLOR :

I shall postpone my Judgment on this Case, as I wish to ascertain whether any Case is to be found in which a Father having, by Will, settled a Sum of Money on a Daughter and her Children, afterwards, on her marriage, makes a payment, either to her or her Husband, and such Payment has been held to be a satisfaction of the Interests of the Children. No such Case has been cited ; and, if any such exists, I do not think that it is conclusive of this, because there are other important circumstances in this Case.

The VICE-CHANCELLOR :

The Bill in this Case is filed for the purpose of obtaining the payment of a Legacy of 10,000*l.*, which was given by the Will of Mr. *John Lambton*.—[His **Honor* stated the material contents of the Will, [313] the Marriage Articles and the Settlement, and then proceeded thus:]—Shortly after this Settlement was executed, *John Lambton* died. There was Issue of the marriage, two Daughters, both of whom attained 21, and afterwards died. The elder Daughter died unmarried: the younger married the Defendant, Mr. *Lennard*. *John Lambton* devised his Residuary Real and Personal Estate, so that it has now passed to Lord *Durham*, who admits assets for the purpose of answering any claim that may in Law exist by virtue of this Will: and the sole question is whether, by Law, the Legacy is now payable. The length of time that has elapsed does not affect the question; because it is not attempted to be said that there is any presumption of payment; but it was argued that the payment ought not to be made.

The Rule of this Court is that, where a Parent gives a Legacy to a Child, and afterwards, upon the marriage of the Child, advances a Sum of Money, that advance shall *primâ facie* be taken as an ademption of the Legacy, because it is a presumption of Law that the Father does not mean to give a double Portion. Cases have arisen in which the Legacy has been given, simply, to the Child, by the Will, and afterwards, upon the marriage of that Child, a Settlement has been made, of the amount of the Legacy or some other Sum advanced at that time for a Portion, not wholly for the benefit of the Child, but for the benefit of the Husband of the Daughter, and of the Children of the marriage, in various modes; and with reference to that state of circumstances, Lord *Eldon*, in the Case of *Trimmer v.* [*314] *Bayne*, (in which Case there had been, by the Will, *a Gift of the Legacy simply, and then, upon the marriage, there was a

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Settlement made, of the Sum which was then advanced, upon the Wife for life, upon the Husband for life, and then upon the Children of the marriage, so as to make it materially different from a mere Gift to the Daughter herself,) after stating the general doctrine, says: "It differs from the performance of satisfaction of a Covenant in this, that the Court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is contended to be given. The Court does not inquire whether the Portion by the Will, is entirely and absolutely to the Child, or what is afterwards advanced in this form, a Settlement upon marriage, which not being a performance of a Covenant or satisfaction of a Debt, yet is a presumed satisfaction of the intended Portion." Therefore, supposing there had been, in this Case, a mere Gift of a Legacy to Miss *Lambton*, and then there had been, on the occasion of her marriage, an advance of 15,000*l.* as a Portion, which, in effect, was settled, (because, the Husband agreeing to make a settlement of his own Estate which should have the effect of securing Portions to the Children, I consider as the same thing, in substance, as if it were a settlement of the Sum given by the Father,) the circumstance that there might be Trusts regarding the Portions which were to be raised, distinct from the Gift, simply, to the Daughter, would not, according to my apprehension, have at all prevented the subsequent advance of the Portion from being an ademption of the Legacy. But it has struck me that there is a considerable difference between the Case where the Legacy is given to the Child simply, and where, upon the marriage of the Child, the Portion is settled, and the Case where [*315] the Legacy is not given, simply, to the Child in the first instance, but is given to the Child, with remainders over to her Children, and, afterwards, upon the marriage of the Child, the Portion is advanced and settled in a different manner from the Will: and it is quite obvious, (if I had to decide this Case upon that ground alone,) that Persons might have become entitled to the Legacy under the Will, who never could have become entitled to the Portions under the Settlement: because, by the Settlement, none could take as Children of Miss *Lambton*, except those who were her Children by Mr. *Wharton*; whereas, under the Will, those might take as her Children who were her Children by any Husband whom she might thereafter happen to marry. I do not observe, however, as far as I have been able to look into the Cases, that the point has ever been, judicially, brought before the Court. It certainly appears to me to be a point of some weight. But, inasmuch as whatever is a presumption of Law, may be rebutted by matter of fact, it is observable in the Case of *Trimmer v. Bayne*, where the question arose whether that presumption of Law should be rebutted by certain Evidence that was offered, Lord *Eldon* says: "Upon the treaty of marriage,

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she had an inchoate Title to the Portion or Fortune to be paid upon her marriage, under the Will. It cannot be disputed that, if there was nothing more than the Will and the Settlement, the latter would be an ademption. The execution of it is a fact to be looked at as a fact of Evidence. The Settlement itself is very material Evidence of the intention of the Parties, and of the Testator as one of the Party; for it is written Evidence, and also it is final Evidence of his intention." Now, if the Settlement itself is to be taken as "the best Evidence of what the Party means, then how are we to deal with a Case in which the Parties have expressly declared upon what terms the Portion is to be considered as advanced. The Articles make it plain that the Sum of 15,000*l.*, whenever it became payable, was to be taken in satisfaction of whatever Sums Miss *Lambton* might become entitled to under the will of her Uncle; and it is a fact admitted in the Answer of Lord *Durham*, that the Sum of 5,000*l.*, which was given to her by her Uncle, was a sum which carried Interest; and, when the Parties have expressly declared that the Sum which was paid down by the Father, though it was called a Portion, should be in satisfaction of the Sum to which, independent of the Father, Miss *Lambton* was entitled, it appears to me that, applying the Rule of Lord *Eldon*, you have got the best Evidence of the intention, and the final intention of the Parties declared upon the Settlement. And the point appears to me to have been put beyond all doubt, by the decision of Lord *Thurlow* in *Baugh v. Read*. It seems, from the Report of that Case, in 1 Vesey, jun., that in the argument of Counsel, the point was distinctly brought before the Court; because the argument is: (z) "In no Case has the Court said a Sum of Money given by a Will in satisfaction of one Sum, shall be adeemed by a Sum of Money agreed to be advanced upon contract to purchase another Sum. The Court cannot go upon such loose principles. If the Party states his intention, the Court will act upon what he states. They cannot say this is a satisfaction: for that purpose they must say that, though he gave this Legacy [*317] in lieu of the Interest in the 6,000*l.*, and 'though, if he had died immediately, he should have taken that Legacy and also the Legacy under *Martin's* Will, yet that his kindness for her grew less at the time of her marriage, without any reason for it, and, therefore, she must lose that Sum."

In the Case of *Baugh v. Read*, it appears that the Children of the Father were entitled to the Sum; and the Father having made a Settlement, and given the Legacy by his Will, the Daughter afterwards married; and there was a stipulation that she and her Husband should transfer her Share to her

(z) See 1 Ves. jun. 264.

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Father, when she became entitled to it, but, if she should die before 23, so as not to become entitled to it, her Husband should not refund any part of the Portion: and the Bill was filed, by the Husband and Wife, against the Executor, claiming the Legacy under the Father's Will: and there were three questions, first whether the Portion given with Mrs. *Baugh*, was to be considered as a satisfaction, or an ademption of the Legacy *pro tanto*; secondly, whether these Legacies were specific or not; and, thirdly, whether Mrs. *Jones's* share ought not to be considered as actually transferred to the Testator: and Lord *Thurlow*, in giving Judgment, said: "It is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the Father intended to give this right to a Sum expected to accumulate before his death, by the addition of all those Sums at least, if not of others."

Here then I consider that there is a clear declaration of the intention of the Parties that the 15,000*l.* should be in satisfaction of Sums, the amount of which, it is to be observed, was not ascertained: and I make that *remark because the Father had, by his Will, expressed that [*318] the 10,000*l.* should be in addition to what the Child should be entitled to under her Uncle's Will. It would be a strange thing to say that the 15,000*l.* which was paid, should be in satisfaction of the Legacy, and also of the Sum given under the Uncle's Will, when it does not appear what, at the time the Portion was advanced, was the Sum due under the Uncle's Will. Therefore, it would be impossible to say that any Portion of 15,000*l.* could be applied in satisfaction of what was due under the Uncle's Will, and the Residue only go in satisfaction of the Legacy: and, as the Parties have expressed the purpose for which the 15,000*l.* should be taken, that is, I think, conclusive of the Case. The consequence is that, as Assets have been admitted, there must be a Decree to take an Account of the Amount of the Legacy, with Interest at Four per Cent. from the death of the Testator: and also, as the Defence is rested solely on a point of Law, and the point of Law has failed, (though it is impossible to say there is any imputation on any Person with respect to the non-payment of this Legacy), the Costs must be paid by Lord *Durham*.

*FELLOWES v. TILL.

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1832: 24th November.—*Practice.—Trustee.—Stat. 11 Geo. 4, and 1 Will. 4, Chap. 60.*

A Decree declared a Defendant, against whom the Bill had been taken *pro confesso*, to be a Trustee of Stock for the Plaintiffs; but the Court declined to refer it to the Master to appoint a Person to Transfer the Stock, in the place of the Defendant, except upon a Petition presented under 11 Geo. 4 and 1 Will. 4, c. 60.

THE Defendant *Till* being entitled, under a Will, to a Sum of Stock

* Affirmed by the Lord Chancellor, 5th August 1834.

 1834.—In re Stanley.

standing in the names of the Executors of the Testator, assigned it to the Plaintiffs, in Trust to sell and retain a Debt which he owed them. Afterwards, the Executors, at his request, transferred the Stock into his name.

The Plaintiffs, then filed their Bill, praying an Account of what was due to them, that the Amount might be raised by sale of the Stock, and paid to them, and that *Till* might be ordered to transfer the Stock to the Accountant-general, in Trust in the Cause. *Till* having absconded, the Bill was taken *pro confesso* against him. The Decree declared *Till* to be a Trustee of the Stock, and directed the Accounts prayed by the Bill to be taken, the Stock to be transferred to the Accountant-general, and the Amount of what should be found due to the Plaintiffs, to be raised by sale of the Stock, and paid to them.

At the hearing of the Cause it was discussed whether the Court could refer it, to the *Master*, to appoint a Person, in the place of *Till*, to transfer the Stock to the Accountant-general, without a Petition being presented for that purpose, under 11 Geo. 4, and 1 Will. 4, c. 60.

The *Vice-Chancellor* decided that a Petition was necessary.

Mr. *Sharpe* appeared for the Plaintiffs.

Mr. *Crompton*, for the Defendants, except *Till*.

[*320] *IN THE MATTER OF MARY STANLEY, DECEASED.

1834: 9th August.—*Trustee*.—*Mortgagee*.—Stat. 11 Geo. 4, and 1 Will. 4, Chap. 60.

A Mortgagee in Fee, died intestate as to the mortgaged Premises, but having bequeathed her Personal Estate to *B*. The Mortgage Money remaining unpaid, *B*. presented a Petition under 11 Geo. 4, and 1 Will. 4, c. 60, praying that some Person might be appointed, in the place of the Mortgagee's heir, (who could not be found,) to convey the Premises to him. But the Court refused to make any Order.

By an Order of the 21st of March 1834, made on a Petition presented by *R. C. Lowndes* under 11 Geo. 4, and 1 Will. 4, c. 60, it was referred to the *Master*, to inquire and state whether *Mary Stanley*, deceased, was a Trustee or Mortgagee, within that Act, of the Premises in the Petition mentioned, and who was her Heir-at-Law, and, if her Heir was not known or could not be found, then to approve of a Person to convey the Premises in the place of *Mary Stanley*, to the Petitioner.

The *Master's* Report was to the following effect. By Indentures of the 14th and 16th of August 1832, after reciting Indentures of the 8th and 9th of the same Month, by which a piece of Land in *Toxteth Park, Lancashire*, was conveyed unto and to the use of *D. Cowling*, for life, with a

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Limitation to the use of *T. O. Buchanan*, and his Heirs, during *Cowling's* life, with Remainder to the use of *Cowling* in Fee; *Buchanan* (a), at *Cowling's* request, conveyed the piece of Land to *Mary Stanley* in Fee, subject to Redemption on payment to her, by *Cowling*, of 1,000*l.* and Interest, on the 15th of February then next; and, if default should be made therein, *Mary Stanley* (b) was empowered to sell the Land, for raising and securing the payment of the 1,000*l.* and Interest; and it [*321] was declared that every Receipt which should be given by her, her Heirs, Executors, Administrators, and Assigns, for the Monies to arise from such Sale or Sales, should be a good Discharge to the Purchaser or Purchasers of the Land. By Indentures of the 13th and 14th of November 1832, certain Houses in *Liverpool*, were conveyed by *T. Cash*, unto and to the use of *Mary Stanley* in Fee, upon Trust that she should, at any time thereafter, of her own proper authority, sell the Houses, for raising and securing to her the re-payment of 1,000*l.* which she had lent to *Cash*, with Interest at Five Pounds per Cent.; and it was declared that her Receipts should be sufficient Discharges to the Purchasers. *Mary Stanley* died on the 9th of September 1833. By her Will, dated the 24th of January 1829, after giving various pecuniary Legacies, she gave the Residue of her Personal Estate, to the Petitioner, his Executors and Administrators. All the Testatrix's Funeral and Testamentary Expenses, Debts and Legacies had been paid by her Executors, but both the Sums of 1,000*l.* remained unpaid. The Master found that the Testatrix was a Mortgagee of the Premises comprised in the Deeds, within the 11 Geo. 4 and 1 Will. 4, c. 60, and that it was not known who was her Heir-at-Law; and he approved of *John Eden* of *Liverpool*, as a proper Person to convey the Premises, in the place of the Testatrix's Heir-at-Law.

Upon the hearing of a Petition, presented by *Lowndes*, praying that the Report might be confirmed, and that *Eden* might be ordered to convey the Premises to him or as he should direct, in the place of the Testatrix's Heir-at-Law;

*Sir *Edward Sugden*, for the Petitioner, expressed a doubt [*322] whether the Case was within the 11 Geo. 4, and 1 Will. 4, c. 60.

The Vice-Chancellor said that by contrasting the 6th and 8th sections of the Act with each other, it clearly appeared that the Legislature did not intend that the Act should apply to Cases like the present, and consequently that he should make no Order upon the Petition (c).

(a) It will be observed that *Buchanan* was merely a Trustee for the life of *Cowling*: the above Report, however, was taken correctly from the Brief of the Petition.

(b) The power did not extend to her Heirs, &c., nor did the Trust for Sale in the following Conveyance

(c) See *In re Goddard*, 1 Myln' & Keen, 25.

1833.—Attorney Gen'l v. Merchant Tailor's Company.

ANONYMOUS.

1934: 7th August.—*Stat. 11 Geo. 4, and 1 Will. 4, Chap. 60.—Lunatic Trustee.—Jurisdiction.* The Vice-Chancellor has no Jurisdiction under 11 Geo. 4 and 1 Will. 4, c. 60, in Cases of Lunatic Trustees or Mortgagees beyond directing the reference to the *Master* in the first instance.

UNDER an Order made upon a Petition presented under 11 Geo. 4, and 1 Will. 4, c. 60, the *Master* had found that the Person named in the Petition, was a Lunatic Trustee within the Act.

Upon the hearing of the Petition to confirm the Report, and for the consequential directions,

The *Vice-Chancellor* said that he had conversed with The *Lord Chancellor*, and that they were both of opinion that he had no Jurisdiction under the Act, to make any Order in Cases of Lunatic Trustees or Mortgagees, beyond directing the reference to the *Master* in the first instance.

[*323] *THE ATTORNEY-GENERAL v. THE MERCHANT TAILORS' COMPANY

1833: 25th June.—*Pleading.*

An Information stated certain Bequests to have been made to the Defendants, upon certain Trusts, and that other Bequests had been made to them upon like Trusts. The Defendants pleaded a Will, containing a Bequest to the Defendants, upon a like Trust, (but in which another Company was interested,) and that that Company was not a Party to the Suit. Plea over-ruled.

IN pursuance of the leave to amend, which was granted by the *Lord Chancellor*, on the Demurrer being allowed (a), those parts of the Information which related to Alderman *Heydon's* Charity, were struck out, but no further alteration was made, except that the former of the two charges mentioned *ante*, page 288, was altered as follows: "That divers other Sums of Money, or other Funds or Property, by way of Bequests or otherwise, have been, from time to time, given to and vested in the said Company of *Merchant Tailors* for the time being, and now are or ought to be vested in the Defendants, in trust to lend out the same, to or upon some other like or corresponding Trust, for the benefit and advancement in trade or business of Freemen of the said Company." The Defendants pleaded to the amended Informa-

(a) See *ante*, p. 288, and 1 Myl. & Keen, 189.

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tion, the Will of Alderman *Heydon*, and that *The Mercers' Company* were not made Parties to the Information.

Mr. *Knight* and Mr. *James Russell*, in support of the Plea.

The Relator has struck out those passages in the original Information in which Alderman *Heydon's* Charity was expressly mentioned, but he has introduced, into the amended Information, the "following [*324] charge: "That divers other Sums of Money, &c." That charge is substantially the same as the charge in the original Information for which it is substituted, and includes the Charity mentioned in the Plea, as effectually as if it were expressly stated in the Information. The other charge, as to the Defendants having in their custody Deeds, &c. relating to the several before mentioned Sums of Money, and *other the matters and things* aforesaid, and the Interrogatory founded on it, remain unaltered. The Prayer of the Information is that it may be declared that the Company are liable to, and chargeable with the several before mentioned Sums of Money, *and other the gifts aforesaid* (if any), and that the same ought to be applied and made available, by way of Loan, to and for the use of Freemen of the Company, for their advancement in Trade or Business, according to the charitable intents and purposes of the several Donors thereof, and that the Defendants may be ordered to account for the same. *Heydon's* Charity is a charity of a like or corresponding nature with those which are expressly mentioned in the Information: it is a Bequest precisely of the same kind and for the same purposes. To hold that it is not so, would over-rule the decisions of your *Honor* and *The Lord Chancellor*, upon the Demurrer. Both Judges held that the Demurrer, so far as it was grounded on multifariousness, was not sustainable. It cannot be contended that an Information relating to Charities which are not of a like or corresponding nature, is not multifarious. The consequence of over-ruling the Demurrer, so far as it was grounded on multifariousness, was to decide that *Heydon's* Charity was of the like or corresponding nature with the other Charities. That Charity comes within the words of the Information; and it prays "relief as to the Charities expressly mentioned in it, and all others of the like nature: but no relief can be granted as to *Heydon's* Charity, unless *The Mercers' Company* are made Parties to the Suit.

The Attorney-General (Sir *Wm. Horne*), Sir *E. Sugden* and Mr. *O. Anderdon*, in support of the Information:

The Defendants first demurred, because *Heydon's* Charity was contained in the Information, and now they plead, because it is struck out. A Defendant cannot, by plea, compel a Plaintiff to introduce into his Bill, that which he is not forced to insert in it, and which would make it bad. The Relator had his election whether he would leave *Heydon's* Charity in his Informa-

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tion, or whether he would strike it out. If he had chosen to leave it in, he must have made The *Mercers' Company* parties. The amended Information states certain Gifts to The *Merchant Tailors' Company*, which are to be administered by them only; and it also states that other Gifts have been made to them upon other like or corresponding Trusts; but they cannot, on that account, introduce another Gift which is not made to them only. They cannot plead what is inconsistent with the Information. The Information is confined to Gifts to The *Merchant Tailors' Company* solely; and, when it alleges that there are other Gifts upon like or corresponding Trusts, it can only be considered as referring to such other Gifts as can be administered upon this Record. Supposing that *Heydon's Charity* were within the purview of this Information, the Relator might, at the Hearing, waive all relief in respect of it. The Information is confined to The *Merchant Tailors' Company*; and, therefore, they cannot introduce another Gift which is complicated with another Corporation.

The Plea is bad in form; for it is, in effect, not a Plea but a short Answer.

The VICE-CHANCELLOR:

I am clearly of opinion that this Plea is bad, and upon two grounds: the first is of a formal nature.

The Information alleges that seven Bequests (which it mentions specifically) have been made to The *Merchant Tailors' Company*, for certain specified charitable purposes, and then it alleges that other Gifts have been made to them, of other Sums of Money, upon like or corresponding Trusts. To this Information a plea has been put in, by which the Defendants, in effect, say that they will not discover whether there any such other Gifts, because there is another Charity, which, when the particulars of it are disclosed, will render it necessary to make another Corporation a Party to the Suit. The Plea, therefore, is, on the face of it, an Answer to the very allegation, the discovery whereof it means to protect the Defendant from making.

Then, with respect to the other, which is the principal ground. When the Information was originally filed, it stated seven Charities, in all of which it appeared that the persons who were interested were The *Merchant Tailors' Company*, or members of that company. But it is stated one Charity also, in which not only the Members of The *Merchant Tailors' Company*, but, also, The *Mercers' Company* were interested. Then an objection was taken to the Information, because The *Mercers' Company* were not made parties to it; and The Lord Chancellor was of opinion that they were necessary Parties; and, accordingly, His Lordship allowed the Demurrer on that ground, but gave the Parties leave to amend the Information.

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It must have been the intention of the Relator and of the *Attorney-general*, when they amended the Information, so to construct the Record as to preclude the power of objecting to it, on the ground that The *Mercers Company* were necessary Parties; and, consequently, with that object in view, the statements regarding *Heydon's Charity* were struck out. The consequence, therefore, is that the Information appears in a different form from what it did; because, before, it represented that there were Charities in which The *Merchant Tailors' Company* and Members of that Company, and also in which The *Mercers' Company* were interested; but, by the Amendment, it is confined to certain specific Charities, in which The *Merchant Tailors' Company* and Members of that Company, alone, are the parties interested. It being then perfectly clear, from the whole of the Proceedings, and from contrasting the Record as amended, with the Record as it originally stood, what was the object of the Relator, there follows this charge: "That divers other Sums of Money, by way of Bequests or otherwise, have been, from time to time, vested in the Company on some other like or corresponding Trust." What then are "the like or corresponding Trusts?" It is quite obvious that any one would say, having regard to what is stated in the amended Record, that the expression "like or corresponding Trusts," means Trusts which have their similarity and their correspondence in respect, namely, that The *Merchant* [*328] *Tailors' Company*, and Members of that Company alone are the objects intended to be benefited by them. It is clear that that was meant: and, though it might be said, in the abstract, that there is a similarity and correspondence between *Heydon's Charity* and the other Charities which are specifically mentioned, it cannot be so said, with truth, on this Record, contrasting it with the Record as it originally stood. The consequence is that, if I were to put the interpretation on those words which these defendants contend for, I should be encouraging a quibble.

My opinion therefore is that, in substance as well as in form, this Plea is bad.

 1834: 2d May.—Answer.—Defendant.—Insufficiency.

An Information alleged certain Sums to be vested in the Defendants, for certain charitable purposes, and that the Defendants had misapplied those Sums: it also alleged, generally, that other Sums were vested in the Defendants upon like Trusts, but did not charge any misapplication or breach of Trust with respect to them: Held that the Defendants were not compellable to answer the general allegation.

THE Information alleged, with respect to each of the Sums which is specifically mentioned, that the Defendants had applied them to their own general Uses and purposes, or, in some other manner not according to the

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Trusts reposed in them ; but it did not allege that the Defendants had been guilty of any misapplication or breach of Trust with respect to the
 [*329] other Gifts, Sums of Money, Funds and Property which it *mentioned *generally*. The Defendants, in their Answer, took no notice of the allegation that other Gifts, &c. had been made to or vested in them, upon some other like or corresponding Trust ; and, on that account, their Answer was excepted to. The *Master* having allowed the exceptions, the Defendants excepted to his Report.

Mr. *Knight* and Mr. *Jas. Russell*, for the Defendants, in support of the Exceptions.

Sir *E. Sugden* and Mr. *O. Anderson*, for the Relator, in support of the Report.

The VICE-CHANCELLOR :

If the Relator, when he introduced into the information, the general allegation as to the Defendants having other Funds vested in them upon like or corresponding Trusts, had gone on to aver, in the most general manner, that those other Funds had been mismanaged, or if he had charged, in the most general terms, any thing which could show that the interference of the Court was necessary with respect to them, then, undoubtedly, the Defendants would have been obliged to answer those allegations. But the Case, as stated on the Record, is precisely this : specific allegations are made with respect to certain charitable Funds, and specific misapplications or breaches of Trust are alleged with respect to them. Then it is averred that the Company have, in their hands, other Funds subject to like or corresponding Trusts ; but there is no allegation with respect to those Funds which are so alluded to generally, that there is any misapplication
 [*330] whatever. This *Court cannot administer relief, unless misapplication is shown ; and, consequently, all the statements contained in the Record upon which no relief can be given, must be considered as irrelevant ; and, therefore, the *Master* is wrong, and the Exceptions to his Report must be allowed.

MEMORANDUM.

The Decision in *Earl Digby v. Howard*, reported *ante*, Vol. 4, page 588, was reversed by the House of Lords, in July 1834.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

HUGHES *v.* DAVIES.*

1832: 17th, 18th & 25th April.—*Tithes.*

In a Suit for Tithes, by a Rector, against the Owner and Occupier of a Farm, part of the Demesnes of a Manor of which the Owner was Lord, he, in order to prove that he was entitled to two Thirds of the Tithes of the Farm, produced a Grant, from Queen Elizabeth, to one of his Ancestors, of a Chapel with the Tithes belonging to it within the Lordship, and also his Title-deeds, in some of which Tithes, in others Tithes of Corn, Grain and Hay, and, in others, Tithes and Portions of Tithes in the Parish and several other places, were conveyed, but in none of them were the Tithes of the Farm mentioned specifically, except in an old lease of the Farm, in which the Lord's part of the Tithes, together with ingress, egress, &c. were reserved. The Witnesses proved that one third only of the Tithes of the Farm and the rest of the Demesnes, had been paid to the Plaintiff and his predecessors, and that one of them, having employed a person to value the Tithes of the Parish, pointed out, to the Valuer, the Farm and other Demesnes as being titheable in the Thirtieth only. The Court refused to decree an Account, until the Plaintiff had established his right, at Law.

THE Bill was filed by the Rector of the parish of *Llanfyllin*, in the county of *Montgomery*, against *Evan Davies*, the occupier, and *Edward Herbert Lord Clive*, and his infant Son, the Tenants for life and in Tail of a Farm in the parish, called *Greenhall*, praying that the Plaintiff's right to the Tithes of the Farm *might be established*, and that *Davies* might account for and pay the Tithes to him.

**Davies*, in his Answer, said that one Third only of the Tithes [*332] of the Farm had been immemorially paid to the Incumbent of the parish, and the remaining two thirds, to the Lords of the Fee.

Lord *Clive*, in his Answer, stated to the same effect, and that two thirds of the Tithes of the Farm had always been treated as Lay Property, and as

* The Reporter was unable to procure the Papers in this Cause in sufficient time to enable him to report it according to its date.

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belonging to the ancient Barony of *Powis*, or as part of the possessions thereof; and that, in various Deeds and Fines relating to the Barony, portions of Tithes were particularly mentioned as part of the possessions of the Barony, or of the owners thereof: that he was unable to set forth how the said portion of Tithes was originally disposed of as Lay Property, except the same was done by some ancient grant now lost, and which, he submitted ought to be presumed, especially as many of the ancient Deeds relating to the Barony and the possessions thereof could not be found, the same having been, as it was believed, either carried away from *Powis Castle*, when the Barony was taken possession of in the time of the Commonwealth, or in the times of King William and Queen Mary, when the then Marquis of *Powis* was attainted and outlawed, and the Barony seized as forfeited to the Crown; but that there had been then lately found, at *Powis Castle*, a counterpart of a Lease of the Farm, dated the 20th of January 1659, and granted by certain persons as Trustees for *Elizabeth Lady Powis*, for 21 years, wherein there was an express reservation of the Lord's part of the Tithes of the premises: that such portion of the Tithes having been always enjoyed by the Defendant and those under whom he claimed, with full knowledge and acquiescence on the part of the several Incumbents of the parish, the Defendant's right to the same ought to be sanctioned and maintained.

[*333] *It appeared, by the Depositions, that Lord *Clive* was Lord of the Manor of *Llanfyllin*, in which *Greenhall* and certain other Farms which the Witnesses named, were situate; and those Farms were formerly one Estate, belonging to the *Powis* Family, and called the *Greenhall* Estate; that they were reputed to be part of the possessions of the ancient Barony of *Powis*, and to be titheable in the Thirtieth only, and that no other Lands in the Parish, except such as were reputed to be part of the possessions of the Barony, were so titheable, but all the other Lands paid Tithes in full; that no more than one Thirtieth of the produce of the excepted Farms, had been paid to the Incumbents, and one Thirty-first part only, when made ready for carrying. One Witness (*E. Rogers*) who had occupied *Greenhall* Farm for four years, commencing in 1775, said that, during his Occupation, he compounded with the Incumbent, for the proportion of the Tithes of the Farm payable to him, on the calculation that one Thirtieth, or one Thirty-first part only (but which he did not recollect) was payable. Another Witness (*Thomas Daniel*) said that he had been employed, for nine years, by the Plaintiff, and his predecessor, Mr. *Williams*, to value the Tithes of the Parish, and that he valued the Tithes of *Greenhall* and the other excepted Farms, at one Thirtieth only; that, in 1808 when he first valued the Tithes for Mr. *Williams*, that Gentleman sent his Servant to show the Witness the Lands which were titheable in the Thirtieth, and that the

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Occupiers told him that they were so titheable, and that he made his Valuation, and the Tithes were compounded and paid for accordingly. Lord *Clive* also entered into Evidence to show that some of the Title-deeds of the *Powis* Family had been lost or destroyed by Fire and other casualties.

*In addition to the Parole Evidence, his Lordship produced [*334] several *Inquisitiones post Mortem*, dated in the Reigns of Edw.

2, Edw. 3, Hen. 4 and Hen. 6, from which it appeared that the Castle and Manor of *Pole*, the Towns of *Pole* and *Llanvylling*, together with *Greenhall* and other Possessions had belonged to the *Charleton* Family and that they afterwards became vested, by marriage, in the *Graye* Family.

Lord *Clive* also produced, Firstly, a Grant from Queen Elizabeth, dated the 10th of December, in the 14th year of her Reign, to *William James* and *John Grey* and their Heirs, of "all that our Chapel, with the Appurtenances, situate within the Castle of *Pole*, in our aforesaid County of *Montgomery*, with all the *Tithes*, Oblations and other Hereditaments whatsoever to the said Chapel belonging, within the Lordship of *Powis*, and all and singular the Tithes of Grain, Sheaves, Hay, Lambs, Wool, and all other Tithes whatsoever, as well Great as Small, Oblations, Obventions, and other Hereditaments, Commodities and Emoluments whatsoever growing, renewing, coming and issuing, as well from the demesne Lands of the late Priory or Monastery of *Bildwas* as from all other Lands, Tenements and Hereditaments whatsoever, to the said late Priory pertaining or belonging, or, as member, part or parcel of the same late Monastery, heretofore known, had and accepted or used, in our aforesaid Counties of *Salop*, *Stafford* and *Derby*, or elsewhere wheresoever, heretofore to Us or to our Progenitors not answered, and, by the Lord Henry 8, our Father, by his Letters Patent not granted or given to *Edward Graye*, Knight, Lord *Powis*:" Secondly, an exemplification of an *Inquisito post Mortem*, dated the 21st of June, 37th Elizabeth, to inquire as to the Lands *and Tenements [*335] of Sir *Edward Herbert*, Knight, deceased, and of a Return thereto dated 19th September, 37th Elizabeth, and finding that, before the death of Sir *Edward Herbert*, *Edward Grey* was seised in Fee of the Barony and Lordship of *Powys Castle*, and of the Manor of *Poole*, and of the Towns of *Poole* and *Llanvylling* and of the Manors of *Powis*, *Poole*, *Llanvylling* and other Manors: and, in the same Return, was recited an Indenture dated 27th February, 29th Elizabeth, whereby Sir *Edward Graye* and his Wife conveyed, and covenanted to levy a Fine unto *John Herbert* and *Edward Herbert* the younger, Sons of the said Sir *Edward Herbert*, of the Barony and Lordship of *Powys*, and, (*inter alia*) the *Tithes of Corne, Grayne and Haye*] growing and renewing in *Pole*, *Buttington*, *Llanvilling*

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and several other Places : Thirdly, an Indenture dated 13th June 1612, and in which was recited and confirmed a Lease, granted by Lady *Herbert* to Sir *William Herbert*, of the Barony of *Powis* and certain other Possessions in the County of *Montgomery*, (except the Castle of *Pole*, and the demesne Lands thereunto belonging, the Farm of *Buttington*, and all *Tenths and Tithes* arising within the Demesnes of *Pole Castle*, the Farm of *Buttington*, or elsewhere within the Barony, and also the Messuages and Farms of *Greenhall*, &c. parcel of the Demesnes within the Barony) : Fourthly, the Settlement on the marriage of *Percy Herbert*, Son of Sir *William Herbert*, dated the 4th June 1622, and containing a Covenant to levy a Fine of the Barony and Lordship of *Powys*, the Castle of *Poole*, the Burroughs of *Poole* and *Llanvyllyn* and the Manors of *Powys*, *Poole*, *Llanvyllyn*, and several others, and of all Messuages, Advowsons, Donations, *Tithes*, Oblations, &c. *to the said Barony, Messuages, Lands, &c., or any of them, or any part thereof belonging, or demised, letten or used with the same : Fifthly, the Chirograph of the Fine levied in pursuance of the Covenant, in which, amongst the other Premises, the *Tithes of Corn, Grain and Hay* in *Pole*, *Buttington* and *Llanvyllyn* were mentioned : Sixthly, the counterpart of a Lease of the 13th of June 1641, granted by Sir *Percy Herbert*, of the Barony and other Hereditaments mentioned in the Settlement, including *Llanvyllyn*, and of all *Tithes*, Oblations and Obventions to the said Barony, Burroughs and Lordships belonging, or therewith demised, letten or used, and the Farm of *Buttington*, and the Mansionhouse of *Greenhall*, and all Buildings and Houses thereunto belonging, and all the Demesne Lands, Woods and Wood Grounds thereunto appertaining : Seventhly, a Bargain and Sale of the 27th August 1653, by which the Commissioners appointed under an Act of Parliament for the Sale of Lands forfeited to the Commonwealth, conveyed to Sir *George Whitmore* and others, for the Life of Sir *Percy Herbert*, some of the Manors and other Hereditaments before-mentioned, and also the Farmhouse and several Parcel of Land constituting the Farm of *Greenhall*, in the Parish of *Llanvyllyn* which were then late parcel of the Possessions of Sir *Percy Herbert*, whose Estate had been forfeited for his Treason against the Parliament and People of *England*, except all Rectories Improprite, Improprite *Tithes*, Compositions for *Tithes*, portions of *Tithes*, Donations, Oblations, Obventions and Rents issuing out of *Tithes*, and all other things saved and excepted as not to be sold, by the Act of Parliament : Eighthly, an Office-copy of a Recovery suffered on the 9th of April 1655, in which *William Herbert* was [*337] Vouchee, of the *Barony of *Powis*, the Castle of *Poole*, the Burroughs of *Poole* and *Llanvyllyn*, and, *inter alia*, *Tithes of Grain and Hay*, growing and renewing in *Llanvyllyn*, and many other Places :

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Ninthly, the counterpart of a Lease dated the 20th of January 1659, by which *Richard and Edmund Sawier*, with the consent of *Elizabeth Lady Powis*, Wife of *Percy Lord Powis*, demised to *Bridgett Parry*, for 21 years, several pieces of Land, part of the farm or ancient Demesnes of *Green Hall*, in the Parish of *Llanvillyn*, reserving to the Person or Persons who, for the time being, should have the immediate Reversion or Remainder of the Premises, all Tymber Trees, Woods and Underwoods on the Premises, and the Lord's parte of the Tythe due upon the Premises, with free Liberty of Ingresse, Egresse and Regresse to carry away the sayd Tythe, or any parte of the sayd Woods (a). Lord *Clive* also produced several other Deeds and Instruments, comprising the Barony and Manors before mentioned, together with either "Tithes and Portions of Tithes to the said Barony, Manors, &c. belonging or therewith used, demised, &c." or "Tithes of Grain and Hay," or "Corn, Grain and Hay renewing and growing in *Poole, Buttington, Llanvillinge, &c.*": and, in the last of those Deeds, which was dated in 1776, the capital Messuage of *Greenhall* with its Demesne, was particularly mentioned.

"Sir *E. Sugden*, Mr. *Simpkinson*, and Mr. *G. Richards*, for [338] the Plaintiff, whose Title as Rector was admitted.

Mr. *Knight*, Mr. *Boteler*, and Mr. *Temple*, for the Defendants, Lord *Clive* and his Son:

The Estate of *Greenhall*, the Tithes of which are claimed by the Plaintiff, is part of the Demesnes of the Barony of *Powis*. The Ownership of that Estate has been as part of the Demesnes of the Barony; and the Barony and two Thirds of the Tithes appear to have been in the same hands, from shortly after the dissolution of Monasteries. In the Reign of *Edw. 2*, the Barony belonged to the *Charletons*. That Family ended in a Female, who married into the *Gray* Family. In the Reign of Queen *Elizabeth*, the Barony came to the *Herberts*, and it has ever since belonged to them. Our Documents do not clearly show the origin of our Title to the two Thirds of the Tithes in question. In the early Cases, where a portion of Tithes was claimed, it was considered necessary to show the Deed of Severance, or to give Evidence of its existence; but it is now settled that that is not necessary, and that Retainer, with colour of Title, if not a mere Retainer, is sufficient. We have a Title going hand-in-hand with the Retainer by the Owners of the Barony: Tithes are mentioned, in our Deeds, from a time shortly

(a) There was indorsed on this Lease, that the Lessee had agreed to pay 8s. for the Lord's privilege of the two parts of the Tithe, and that she was to set the Parson out his due, being the Thirtieth, according to custom. The Plaintiff's Counsel objected to this Indorsement being read as Evidence, on the ground that it appeared to have been written subsequently to the Lease: And the Vice-Chancellor allowed the objection.

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after the dissolution of Monasteries. The description of them varies. In some of the Deeds we find the word "Tithes" only: in others, "Tithes and portions of Tithes;" and, in others, "the Tithes of Corn, Grain and Hay:" but it clearly appears that Tithes in the Barony of *Powis* and Parish of *Llanfyllin*, were part of the possessions of the Owners of the [*339] Barony; and, in the counterpart of the Lease of 1659, the Lord's part of the Tithes of the Farm, is expressly reserved.

It appears, by the *Inquisitiones post Mortem*, that the Castle of *Poole* was the head of the Barony of *Powis*, and that *Greenhall* was held with it. It appears also that there was a Chapel within the Castle. That Chapel, together with others, was suppressed in the Reign of Edw. 6: and Queen Elizabeth, in the 14th year of her Reign, granted the Chapel with the Tithes belonging to it in the Lordship of *Powis*, to *William James* and *John Grey*. There is considerable probability that those were the Tithes in question, and, from the coincidence in the Names, and the usual mode of proceeding in like cases, that the Grant was made to those Parties, as Trustees for the *Gray* who was the Owner of the Barony.

The Witnesses prove that the Rectors have never received more than one Third of the Tithes of this Farm, and of the other Demesne Lands; and that the full Tenth has been paid for all the other Lands in the Parish. Our Case is stronger than it would have been if we had never paid any part of the Tithes; for payment of one Third to the Incumbent, has been decided to be equivalent to perception, by the Owner or Occupier, of the other two Thirds. The Court is now called upon to give a Right which has never been enjoyed, or even claimed, by the Plaintiff or any of his predecessors. We have shown by our Deeds, a general Title in the Lordship, and a Retainer of two Thirds of the Tithes in question; and, as there are no other Tithes to which the description in the Deeds can be applied, the Court is bound to apply it to those Tithes. The reservation in the Counterpart of 1659, puts the matter out of all dispute.

[*340] The *Herbert* Family were formerly Catholics, and have been subject to Forfeitures and other Casualties. It appears too that their residence in *Lincoln's Inn Fields*, and some of the Rooms in *Powis Castle*, were destroyed by Fire. This accounts for the loss of some of the Family Documents. We submit, however, that we have produced Evidence enough to make out a Title to the two Thirds of these Tithes. But it is not incumbent on us to prove a clear, positive Title: all that is necessary is to show that there is a question to be tried; for the Court has no right to decree an Account, where the Legal Title is in dispute; and no Account can be decreed against the Evidence which we have given. *Scott v. Airey*

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(b), *Strutt v. Baker* (c). That Case is not distinguishable from the present. *Lady Dartmouth v. Roberts* (d), *Berney v. Harvey* (e), *Cherry v. Legh* (f), *Norbury v. Meade* (g), *Fanshaw v. Rotheram* (h), *Oxendon v. Skinner* (i), *Williams v. Bacon* (k).

Mr *Lloyd* for the Defendant *Hughes*.

Sir *E. Sugden*, Mr. *Simpkinson* and Mr. *G. Richards* for the Plaintiff:

The Defendants have failed to make out any Defence. They say that they have an actual Title to two Thirds of these Tithes. It was said that the receipt of one Third of the Tithes, was more prejudicial to the Rector than if he had received nothing: but, as his Title would not *have been impeached if he had received no portion of the Tithes, [*341] it cannot be worse because he has received one Third. It was also said that it was not necessary for Lord *Oliver* to show the foundation of his Title, but that it was probable that these Tithes were annexed to the Chapel. But there is no proof that the Chapel was annexed to any Monastery. It might have been a private Chapel. There is no proof of render of Tithes to the Chaplain: there is nothing to show what were the Tithes belonging to him. The mere mention of Tithes belonging to the Chapel, does not show that two Thirds of these Tithes were appropriated to the Chapel. Perception alone is not sufficient: there must be both perception, and colour of Title. The Grant of the Chapel being put out of the Case, how is the foundation of Lord *Oliver's* Title made out. - A Party who rests his Title on Presumption, must first show, to the Court or Jury, what he would have them presume—what is the mark he aims at. But here there is no proof of the appropriation of the two Thirds of these Tithes to any Monastery, or of the dissolution of any Monastery to which they could have been appropriated, or of any Grant from the Crown, or of any original Instrument of Severance. The Court is called upon to presume Appropriation, Dissolution, and a Grant from the Crown. It is not even pretended that there is any Composition Real, in this Case. How then is this Property taken out of the Church? Until the Tithes are shown to have vested in the Crown, (which cannot be done except by proving that they belonged to a dissolved Monastery) there is no Case to argue.

Having destroyed the foundation of the Defendant's Title, it is unnecessary to observe further upon it, except *to meet every [*342] view of the Case. There is no Evidence that the two Thirds of these Tithes were ever demanded, paid, demised or agreed for, or that there

(b) 3 Gwill. 1174.

(c) 2 Ves. jun. 625.

(d) 16 East. 334.

(e) 17 Ves. 119. See p. 126.

(f) 1 Bligh, New Series, 306.

(g) 2 Price, 338, and 3 Bligh, 211.

(h) 1 Eden, 276.

(i) 4 Gwill. 1513.

(k) 1 Sim. & Stu. 415, and 3 Russ. 525.

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has ever been any dealing respecting them, by the Lord of the Fee. Payment of one Third of the Tithes is not a perception of the other two Thirds. None of the Documents which have been produced, except the Counterpart of 1659, have any bearing on the question. They do not show a colour of Title. One of the earliest of the Deeds that contain any allusion to Tithes, is that of the 27th February, 29th Elizabeth. That Instrument does not specify these Tithes: it does not even mention Tithes or portions of Tithes, but merely the Tithes of Corn, Grain and Hay, and not the Small Tithes, in *Llanfyllin* and several other Places, or any of them. The same observation applies to several of the Documents. Others of them mention Tithes, together with Free Warren and other general words, in 30 different Parishes. That is no assertion of Title, and, if it is, it shows that the Defendants are entitled to the full Tithes of all the Lands. In the Counterpart of 1659, the Lord's part of the Tithe of *Greenhall* is reserved. We never disputed that one Third only of the Tithes of that Farm had been paid. The Lessors might have wished to receive the other two Thirds. But they did not demise those two Thirds, or let the Farm free from the payment of them, nor is there any proof of payment. If there had been no reservation, it might have been argued that the two Thirds were demised; but the reservation precludes the Defendants from that argument. The Lessors did not venture to demise the two Thirds; so that this Instrument destroys the Defendants' case. At all events, it is a solitary assertion of right; and there is no Evidence of dealing with this portion of Tithes, in more recent times. What have Lord *Clive* those and under whom he claims, done with regard to this portion of Tithes, for the last century and a half? Have they ever demanded, received or let it, or contracted to let the Farm Tithe-free. The utmost that the Evidence shows, is that the Rector, instead of receiving a Tenth, has received a Thirtieth only.

The Case now made for the Defendants is put on a different ground from that in the Answer. The Defendants now say that a Severance is to be presumed. In their Answers they say that there could be no such Severance, and that two Thirds of the Tithes were never part of the Rectory, but always belonged to the Lords of *Powis*. This is a mere Prescription *in non decimando*. *The Corporation of Bury St. Edmunds v. Evans* (l), *Nagle v. Edwards* (m). In *Cherry v. Legh* the decision was against the Defendants, and there is not a single word in the Case, in their favour. In the other Cases which were cited for the Defendants, either the origin of the Defendant's Title was shown, or Deeds were produced by which the

(l) 2 Gwill. 757.

(m) 4 Gwill. 1442.

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Tithes in dispute had been conveyed, specifically, for a long period of years, and there had been a perception of and dealing with them, by Leasing or otherwise, which went hand in hand with the Title. And, even in those Cases, the Court did not hold the defence to be a good one, but merely said that, with such a Title, it would not assist the Incumbent. In this Case the Deeds contain general, sweeping words, and there has been mere non-payment, both of which go for nothing.

*Mr. Knight, in reply :

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The Court cannot establish the Plaintiff's right, without a Trial at Law.

[The *Vice-Chancellor* :—There is nothing in this Case to justify me in establishing the Plaintiff's Right, without directing an Issue : and, if I were to decree an Account merely, I must dismiss the Bill, as against Lord Clive and his Son, with Costs.]

The Defence made by Lord Clive, in his Answer, is not a prescription in *non decimando*. He says that two Thirds of the Tithes have always, that is, as far back as Evidence goes, been received by him and his Ancestors. He adds that he cannot set forth by what means the said portion of Tithes was originally disposed of as Lay Property, except the same was *done by some ancient Grant* now lost, and which ought now to be presumed.

In a Case of Claim of Tithes as Lay Fee, it is not necessary for the Claimant to prove that the Tithes formerly belonged to a dissolved Monastery, or to show the origin of his Title. All that is necessary is to show either perception or colour of Title. *Scott v. Airey, Strutt v. Baker, Berney v. Harvey; Williams v. Bacon*. Your Honor cannot say that there has not been perennity in this Case, without over-ruling *Strutt v. Baker*. How can there be perennity by the Owner of the Lands, except by Retainer ? Here there has been payment of one Third, and a Retainer of two Thirds. This is an open assertion of Title. The present Case has a still stronger ingredient in it than *Strutt v. Baker*. It appears, by the Evidence of *Daniel*, who was employed to value the Tithes of the Parish for the Plaintiff and his predecessor, that the latter sent his Servant to point out [*345] the Lands which were titheable in the Thirtieth. Is this a mere Retainer ?

If we have shown, not only that there has been this dealing with the two Thirds, but that it is supported and explained by the Deeds, are we not then justified in asking your Honor to refrain from decreeing for the Plaintiff. The language of the Deeds may not be so precise as might have been wished, but it is explained by the enjoyment of the Property, by Lord Clive and those under whom he claims, for centuries. There is no Evidence that there is any Tithe-property in the Family, by which the language of the Deeds can

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be satisfied, except that in question. By 1 Edw. 6, c. 14, free Chapels and their Possessions were vested in the Crown. The Grant in 14 Elizabeth, of the Chapel within the Castle of *Pole*, with the Tithes belonging to it, which were vested in the Crown by the 1 Edw. 6, may be fairly supposed to be the origin of Lord *Clive's* Title. By that Grant, the Tithes were united to the Barony, and, therefore, they were naturally described afterwards as belonging to it.

It was said that the Tithes are vaguely described in the Deeds; but no satisfactory answer has been given to the reservation, in the Lease of 1659, of the Lord's part of the Tithe, with liberty of ingress, egress and regress for carrying it away. That explains every thing. Many of the more modern Deeds contain the words "Portions of Tithes" as well as "Tithes." The Documentary Evidence shows much more than colour of Title; and very little ought to satisfy the Court after so long an enjoyment. Lord *Clive*, however, is ready to try his right at Law.

[* 346] *The VICE-CHANCELLOR :

In this Case a Bill has been filed by the Rector of the Parish of *Llanfyllin*, for the payment of Tithes in Kind; and the Defence that is set up is, in substance, that, as to two Thirds of the Tithes, they are Lay Fee, belonging to Lord *Clive* and his Son, the Infant Tenant in Tail: and, in support of the Defence, Evidence has been entered into, both Documentary and Oral. It appears, from the Documentary Evidence, that a Grant was made, by Queen Elizabeth, of the Chapel of *Pole*, with the Tithes belonging to it, in the Lordship of *Powis*, to an Ancestor of Lord *Clive*; but it does not appear what Tithes did belong to the Chapel of *Pole*. Several other Documents have been produced which go to show that the Ancestors of Lord *Clive* have been entitled to Tithes, generally speaking, in the Parish of *Llanfyllin* and several other Parishes; but there does not appear to be any Deed which conveyed the Tithes of this Parish in particular, or the Tithes of the Farm in question, except a Lease dated the 20th of June 1659, which was a Lease of several Parcels of Land, part of the Farm of *Greenhall*, reserving the Lord's part of the Tithes of the Land, and a right to carry away the same. An observation was made upon the effect of that Instrument, that it, at the utmost, reserved the right to the Lord, and did not at all affect the possession of the Land in the hands of the Tenant; but that does not appear to me to be correct, because not only is there a reservation of the Lord's part of the Tithes, but there is also reserved the right to carry them away; and, therefore, it was a reservation which went directly to affect the Occupation of Tenant. Subsequently to that Instrument, several others were produced, but which were all of the general nature I have mentioned,

[*347] namely Instruments which profess to deal, *as matters of Lay In-

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heritance, with the Tithes of *Llanfyllin*, and several other places, but without specification.

In addition to this there has been produced a great deal of Parole Evidence; but it is not necessary to notice any part of it, except what was given by *Edward Rogers*, and by *Thomas Daniel Rogers*, who, together with his Brothers, had at one time occupied the Farm of *Greenhall*, says, "That during the time he and his Brothers occupied *Greenhall* Farm and Lands, the Composition or Compositions made by them with the Parson or Incumbent of the said parish of *Llanfyllin* for the time being, for or in respect of the Tithes or proportion of Tithes due and payable, to such Parson or Incumbent, for or in respect of the said Farm and Lands, where such Tithes or proportion of Tithes were not rendered in Kind, were made upon the footing and calculation that a portion only, namely, a Thirtieth or Thirty-first part of the titheable matters (but deponent does not exactly recollect whether it was a Thirtieth or Thirty-first part) was due and payable, and that such Composition or Compositions were accordingly acted upon during the whole time of the occupancy of the said Farm and Lands by this deponent and his Brothers." And *Daniel*, in his answer to the seventh Interrogatory, says, "That he was employed, as a Tithe-valuer, by Mr. *Hughes*, the Plaintiff, and also by Mr. *William Williams*, his predecessor: That, about the year 1808, he was employed by the said Mr. *Williams* to value the Tithes payable to him within the said parish of *Llanfyllin*, and then made a valuation thereof, and continued to do so yearly, until Mr. *Williams's* death, which happened in September 1813: That he was *thereon employed by [*348] Mr. *Evans*, the Sequestrator of the said Living, to value the uncut Crops on behalf of the Successor, the Plaintiff: That, during all these years, he valued the Tithes of Grain and Hay only arising from all the Lands within the parish of *Llanfyllin*, and that he valued them at the Tenth, with the exception of *Greenhall* and the other Farms and Lands before specified," with those three other Farms this Case has nothing to do, "which he valued at the Thirtieth: That, in the year 1808, when he was employed by Mr. *Williams*, he, Mr. *Williams*, sent his servant to show deponent the Lands within the parish of *Llanfyllin* which were titheable in the Thirtieth, and the Occupiers of those Lands also told him that the Lands so shown to him were titheable in the Thirtieth only, and, for that reason, he, the Deponent, valued and computed such Thirtieth only, and not the full Tithes of such Farms and Lands: That he generally attended at the Tithe-rent Days, and the Tithes were compounded and paid for in the Tenth or Thirtieth, according to his Valuation thereof: and that he assisted Mr. *Williams* in receiving such Composition for the said Tithes, and that Mr.

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John Jones, and *Mr. John Hughes*, or one of them, received the Composition for the said Tithes for the use of the said Plaintiff, he, this Deponent, being generally present." And, in his Answer to the 8th Interrogatory, he says, "He cannot answer, save as to the nine years deposed to in his Answer to the 7th Interrogatory, that, during the said years, the Compositions were made upon the footing and calculation that a Thirtieth only of the Tithes of *Greenhall* and the other excepted Farms and Lands, were due and payable, and such Compositions were acted upon during the nine years, for the reasons aforesaid." There is a great deal of other Evidence, [*349] *given by the several Witnesses, and it appears from them that this mode of dividing the Tithes, namely, by letting the Incumbent receive only either the Thirtieth, or the Thirty-first part, in case of the Corn being in a more matured state for carrying away, has been acted on for several years; and it appears also that the Lands in question, were known by the name of the Thirtiethable Lands.

It was insisted that, notwithstanding this Evidence, there ought, at once, to be a Decree for Tithes according to the Prayer of the Bill, because of the general right which the Plaintiff, as Rector of the parish, has by Law. It must be observed, however, that no Evidence whatever has been entered into by the Plaintiff. His general right then stands opposed by this Evidence; and the question is whether, without further Inquiry, it is the Plaintiff's right to have a Decree for an Account.

It is unquestionable Law, upon all the Authorities, that an Account for Tithes is only given, in this Court, as a consequence of the Title of the Plaintiff being clearly made out, and, if there is any reasonable doubt of the extent of his Legal Right, that this Court will not act until the right be established at Law. It has been said that, where a Defence of this nature has been set up, it is necessary either to produce the original Grant which severed the Tithes, or to give Evidence of the Grant. I think that a considerable degree of obscurity has been thrown upon that doctrine by the Judgment of Lord *Northington*, in the Case of *Funshaw v. Rotheram*, in 3d Gwillim, but which is more fully reported by Mr. *Eden*. But, even in the Case of *Funshaw v. Rotheram*, though the proposition seems [*350] to be so laid down *by Lord *Northington*, yet it is manifest that he admitted Evidence of possession as being satisfactory that there had been a Grant, although there was no Grant produced, nor any Evidence given of the existence of any Grant at any time, other than that which might be drawn, by inference, from the fact of long Possession. A great variety of Cases were referred to in the Argument, which it is not necessary to travel through: they are all to be found stated in the last Case of *Bacon v. Williams*, which first came before Sir *J. Leach*, V. C., and

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afterwards before Lord Eldon, C. : and the result of all the Cases seems to me to be this, that, if there has been an adverse Retainer of Tithes grounded upon an Allegation of Title, to which Title colour is given by the production of old Instruments, this Court will not interfere, even on behalf of a Spiritual Rector, without he proves his Title at Law. In the Case of *Berney v. Harvey*, Lord Eldon, speaking of the Case of *Fanshaw v. Rotheram*, says : " That was the Case of a Lay Impropiator : the Defendant was a person not prescribing in *non decimando*, but claiming Title to the Tithes in pernaney ; and the Doctrine of the Court in that Case also was that a mere Retainer, unexplained by any Deed or Instrument asserting Title, not merely to retain, but to enjoy, is not a Defence against a Spiritual Person or a Lay Impropiator. If, on the other hand, it appeared, in the Case of a Lay Impropiation, that the Defendant had Lands which never paid Tithes, and had made them the subject of Lease or Conveyance under colour of Title, coupling the fact of Retainer and the colour of Title, they considered that a sufficient ground for sending it to Law : but, if no more was alleged than a mere Case of Retainer and Prescription in *non decimando*, they would not send that to Law." *That ap- [*351] pears to me to be a clear Statement of the doctrine to be deduced from the Cases which were quoted. In addition to the Case of *Fanshaw v. Rotheram*, (which was a Case of Thirtiethable Lands), there is the subsequent Case of *Foxcroft v. Parris (o)*, which was a Case of Thirtiethable Lands also. In that Case, Lord Alvanley, M. R., refused to make a Decree for an Account until the Title was proved at Law. The same doctrine, in other words, is to be found in what Lord Eldon said in giving Judgment in the Cases of *Norbury v. Meade*, *Cherry v. Legh*, and *Bacon v. Williams*. The Case of *Bacon v. Williams* seems to be entitled to most weight in this particular Case, because it was said there, as an Answer to the Plaintiff's claim, that Mr. *Phillipps* was entitled to a certain annual Sum of 4s. 10d. as a Modus for the Tithes of *Cliff Slade* ; and it appears that there was no Deed produced which showed the severance of the Modus, if it were a Modus, from the Spiritual Rector : but the first item of proof that was adduced was a Deed dated in 1670, by which the Rate Tithe, as it was called, was conveyed to an Ancestor of Mr. *Phillipps* : but that Conveyance, followed by some other Deeds, and coupled with the Oral Evidence that there always had been that Payment made, to Mr. *Phillipps* and his Ancestors, as the Persons rightfully entitled to it as a portion of Tithes, was sufficient to induce a Jury to hold that he was entitled to that Modus, as a portion of Tithes, although there was no original Grant produced, nor any Evidence produced, other than what was mere matter of inference from

(o) 5 Ves. 221.

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those facts, that there ever had been any Grant which severed the Tithes from the Spiritual Rector.

[*352] *Lord *Clive*, therefore, having produced this Deed of the year 1659, and also subsequent and anterior Conveyances speaking, in a general way of the Tithes of *Llanfyllin*, and having got this Evidence, namely, that the Rector himself has admitted that he was entitled, "in respect of this and some other Lands, to the Thirtieth only, at the time that he was asserting his Title to the Tithes of the rest of the Parish, in full, I should not I think be justified in making a Decree for an Account, until the Plaintiff has proved his Title at Law. Therefore the Order I shall make is that this Bill be retained for 12 Months, with liberty for the Plaintiff, to bring such Actions as he shall be advised, touching the Matters in question: And, in case the Plaintiff shall not proceed to Trial in such Action, within that time, that the Bill be dismissed with Costs: but, if he shall proceed to Trial within that time, then that the consideration of Costs and Further Directions be reserved in the mean time: and, in either event, the Parties are to be at liberty to apply to the Court, as there shall be occasion (*p*).

[*353] *CROMPTON v. LORD MELBOURNE. CROMPTON v. WOMBWELL*.

1832: 28th April.—*Vendor and Purchaser.—Compensation.*

A. agreed to sell an Estate, Tithe-free, to *B.* Afterwards, *C.*, the Vicar of *L.* (in which Parish part of the Estate was situate) filed a Bill for Tithes against the Occupiers of another part of the Estate, as also being situate in *L.* *A.* agreed that part of the Purchase-money should be set apart, as an Indemnity to *B.* against the Claim made by *C.*; which was accordingly done, and *B.* paid the remainder of his Purchase-money, and took a Conveyance of the Estate. *C.* died, and his Suit was dismissed for want of prosecution, but the Indemnity fund was not transferred to *A.* One of *C.*'s Successors instituted a fresh Suit for the Tithes of the same Lands. Pending these Proceedings it was discovered that those Lands were situate in the Parish of *S.* and were titheable to the Rector of *S.*, and, on proof of those facts, the latter Suit was dismissed at the hearing. Held that *B.* was entitled to a Compensation out of the Fund, for the Tithes of the Land situate in *S.*

HENRY, Earl *Fauconberg*, by his Will, dated in November 1801, devised all his Estates to the Defendants, Lord *Melbourne* and Sir *George Wombwell* in Fee, in Trust to settle his Estates in *Over Silton*, *Nether Silton*, and certain other Places in the County of *York*, on his Daughter, Lady *Ann Wombwell*, and her Issue, in strict Settlement, and his Estate at *Kepwick*, in the same County, on Lady *Charlotte Wynn Belasyse* and her Issue, in like manner: and he directed that, in the Settlement to be made by the

(*p*) No Action was brought by the Plaintiff.

* See *Crompton v. Wombwell*, ante, Vol. IV. p. 628.

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Trustees, Powers of Sale and Exchange should be inserted, in the usual form. The Testator died in March 1802; and in January 1805, the Trustees put up for Sale by Auction the Estates directed to be settled on Lady C. Wynn Belasyse and her Issue. In the Particulars of Sale, the *Kepwick* Estate was stated to be chiefly Tithe-free, and the Outgoings of it were described as follows: "Outgoings from a part of *Kitson's* Farm, 12l. : a Modus from the Township of *Kepwick*, 13s. 4d. : a Modus to **Cowsby*, 2l. ; a Modus paid for part of *Weighill's* Farm, 2l. 2s.—16l. 15s. 4d." [*354]

Joseph Swift, who had been employed to value the *Kepwick* Estate for the Plaintiff, with a view to his purchasing it, received one of the Particulars from the Agent of Mr. Wynn Belasyse, the Husband of Lady C. W. Belasyse; and, in making his Valuation, he had regard to the Contents of the Particular, and valued the whole of the Estate as being Tithe-free, except so far as it was subject to the Moduses and Outgoings mentioned in the Particular; and he sent his Valuation to the Plaintiff. The *Kepwick* Estate not having been sold by Auction, the Trustees, by Indentures of the 2d and 3d of May 1805 settled that Estate on Lady Charlotte Wynn Belasyse, and her Issue, pursuant to the Directions of the Will; and, on the 4th of May 1805, they, together with Mr. and Lady C. Wynn Belasyse, entered into an Agreement, in writing, with the Plaintiff, for the Sale of the Estate to him for 29,500l., which exceeded *Swift's* valuation. The Agreement, after describing the Estate particularly, proceeded thus: "Which said Manor, Messuages, Lands, Tenements, Hereditaments and Premises hereinbefore particularly mentioned, are situate and being in the several Towns, Townships, Precincts or Territories of *Kepwick* aforesaid, and *Cowsby* and *Nether Silton*, or in the Parishes of *Leak* and *High Silton*, in the said County of *York*, and were late the Estate of the late Earl of *Fauconberg*, and are free from all Incumbrances whatsoever, other than and except the yearly Sum of 13s. 4d. payable to *Warcup Consett*, his Heirs and Assigns for ever, as and for a Modus for and in lieu of all the Tithes, as well Great as Small, arising and renewing within such parts or *part of the said Mes- [*355] suages, Lands and Tenements as are situate and being within the Township or Territories of *Kepwick* aforesaid, and in the Parish of *Leak*, and also excepting the yearly Sum of 2l. payable for ever to the Rector for the time being of *Cowsby* aforesaid, as and for a Modus for and in lieu of the Tithes, as well Great as small, arising and renewing within such parts of the said Hereditaments and Premises as are situate and being within the Township, Precincts, Territories or Parish of *Cowsby* aforesaid, and also excepting the yearly Sum of 2l. 2s. payable to the Vicar for the time being of *Leak*, as and for a Modus for and in lieu of all the Tithes, as well Great as

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Small, arising or renewing within such part or parts of the said Messuage, Farm and Lands now in the Occupation of the said *James Weighill*, as are situate and being in the Town, Township or Territories of *Nether Silton* aforesaid."

After the Agreement was signed, it was discovered that *Kitson's* and *Weighill's* Farms were situate partly in the Township of *Kepwick*, and partly in the Township of *Nether Silton*; upon which a question arose, whether the parts situate in the latter Parish, passed under the Devise, in Lord *Fauconberg's* Will, in favour of Lady *C. Wynn Belasyse* and her Issue, or under the Devise in favour of Lady *Ann Wombwell* and her Issue: previously, however, the whole of those Farms had been considered as passing under the former Devise. In consequence of this Doubt it was agreed that 4,000*l.*, the estimated Value of the Premises affected by it, should be deducted from the Purchase-money, and that the performance of the Contract, as to those Premises, should be suspended until the question could be decided, but should be proceeded with as to the Remainder of the purchased Estate.

In Michaelmas Term 1808, and after that arrangement had been made, *Daniel Addison*, Clerk, the Vicar of *Leak*, filed a Bill for Tithes against several of the Tenants of the Lands not affected by the doubt, which were situated in the Township of *Kepwick* and Parish of *Leak*. By Indentures of the 9th and 10th of June 1808, after reciting Lord *Fauconberg's* Will, and that the Trustees had contracted with the Plaintiff for the Sale to him of the Inheritance in Fee Simple in Possession of and in the Lordship or Manor of *Kepwick*, and all the Lands, Tenements and Hereditaments situate or being within the said Manor, Town or Township or Territories of *Kepwick*, within the Parish of *Leak*, as thereafter described (being parcel of the Premises which were comprised in the Indentures of May 1805) free from all Incumbrances, except and subject as therein-after mentioned, at or for the price or sum of 25,500*l.*: It was witnessed that, in consideration of 10,000*l.* and 1,500*l.* paid to Lord *Beauchamp* and another Mortgagee of the Estate, and of 14,000*l.* paid to the Trustees, the Manor of *Kepwick* and all the other Hereditaments comprised in the Agreement, except those parts of *Weighill's* and *Kitson's* Farms as to which the doubt was entertained (the Hereditaments not excepted being mentioned to be situated in the Towns, Townships, Precincts or Territories of *Kepwick Cowsby*, and in the Parish of *Leak*) were conveyed to the Plaintiff in Fee, subject to the payment of 13*s.* 4*d.* to *Warcup Consett* his Heirs and Assigns, as and for a Modus, and in lieu of all the Tithes of such parts of the

[*357] Lands thereby conveyed as were situate in the Manor, Township or Territories of *Kepwick*, and also subject to and chargeable with the yearly Sum of 2*l.* payable to the Rector of *Cowsby*, as and for a

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Modus in lieu of the Tithes of such parts of the Lands thereby conveyed as were situate in the Town, Township, Precincts or Territories, or Parish of *Cowsby*: and those Moduses were excepted in the Covenant against Incumbrances. The parties having agreed to indemnify the Plaintiff against the claim made by Mr. *Addison*, a Memorandum dated the 22d of June 1808, and signed by the Plaintiff, Mr. and Lady *C. Wynn Belasyse* and the Trustees, was endorsed on the Release of June 1808, by which it was declared that, although the Sum of 14,000*l.* was mentioned, in the Indenture and in the Receipt endorsed thereon, to be the Consideration Money paid, by the Plaintiff, to the Trustees, it was understood between them that the Sum of 10,400*l.* only had in fact been paid, the Sum of 3,600*l.* having been laid out, by the Plaintiff, with the consent and approbation of Mr. and Lady *C. Wynn Belasyse*, in the purchase of 5,255*l.* 9*s.* Three per cent. Bank Annuities, in the Names of the Trustees and *Samuel Crompton* the Younger, which Sum it was agreed should remain in their Names pending the Suit which had lately been instituted by *Daniel Addison* claiming a right to the Vicarial Tithes of the Estates conveyed by the Indentures of the 9th and 10th of June 1806, and which had been sold Tithe-free, save the Moduses before mentioned: and that it was also understood and agreed that, *until the Suit should be decided*, the Dividends of the 5,255*l.* 6*s.* Stock should be accumulated, and that the accumulated Fund should be disposed of according to the Trusts thereof to be declared by a Deed intended to be forthwith prepared, and which the Parties *respec- [*358] tively agreed to execute. In June 1808, Mr. *Hirst*, who was employed, by the Plaintiff, as his Solicitor in the Purchase, waited upon Lord *Beauchamp*, the first Mortgagee of the *Kepwick* Estate, at his house in the Country, for his execution of the Conveyance to the Plaintiff; and a few days afterwards, his Lordship's Solicitor in London delivered, to Mr. *Hirst*, a Box containing the Title-deeds of the Estate, which he took with him into the Country, without examining its contents. Previously, however, to September 1808, Mr. *Hirst* found, amongst the Title-deeds, the Copy of a Decree of the Court of Chancery made in 1626, in a Suit in which the Master, Fellows and Scholars of *Trinity College Cambridge* were Plaintiffs and *Thomas Lepton* (under whom Lord *Fauconberg* and his Ancestors claimed the *Kepwick* Estate) and other persons, were Defendants, and in which it was stated that the greater part of that Estate was situate in the Parish of *Over Silton* (of which Parish the College were Rectors and entitled to the Tithes), and the remainder in the Parishes of *Leak* and *Cowsby*. The *Fauconberg* Family had been Lessees of the Tithes of *Over Silton* for a considerable number of years down to Michaelmas 1819. By a Deed-poll of the 21st of October 1808, executed by the Trustees, the Plaintiff

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and Mr. and Lady *C. Wynn Belasyse*, it was declared that, *until the Suit instituted by Mr. Addison should be finally decided or determined*, the Trustees, and *Samuel Crompton the Younger* should accumulate the Dividends of the Stock, and that, *in case the said Suit so then pending as afore-said*, should be finally determined against Mr. Addison in respect of the Tithes claimed by him, the accumulated Fund should be transferred to the

Trustees ; but if, on the final decision and determination of the [*359] said Suit, either the whole or any part of the "Lands comprised in the Deeds of June 1808, should be decreed to be subject to the payment, to the said Vicar of *Leak*, of any Tithes whatsoever, that then the whole, or so much of the Fund as should be a Compensation to the Plaintiff for such Tithes and for his Costs, should be transferred to him. In November 1808, Mr. *Hirst*, who was also employed by Messrs. *Cocker of London*, the Solicitors for the Defendants in Mr. Addison's Suit to act as their Agent in the Country and to collect and furnish them with Evidence on behalf of those Defendants, sent to Messrs. *Cocker* a Copy or Extract from the Copy of the Decree found as before mentioned : but he did not inform the Plaintiff of its contents until some time in the year 1810.

Mr. Addison having died, his Suit was not proceeded with, and his Bill was ultimately dismissed for want of Prosecution. Dr. *Byam* succeeded Mr. Addison, but did not institute any fresh Suit respecting the Tithes. Prior to March 1811, several applications were made to the Plaintiff's Solicitor, by and on behalf of Mr. and Lady *Charlotte Wynn Belasyse*, first for payment of the Dividends of the Indemnity Fund, and afterwards for the transfer of the Capital : but those applications were not complied with, the Plaintiff insisting that the Fund should remain as an indemnity to him, until all questions as to the Tithes of the *Kepwick Estate*, should be finally settled. In November 1814, Mr. *Warrington* succeeded Dr. *Byam* in the Vicarage : and in Michaelmas Term 1818 he filed a Bill, in the Exchequer, against the Tenants of the Farms which had been occupied by the Defendants in Mr. Addison's Suit, claiming Tithes of the same nature as had been claimed by Mr. Addison. The Defendants in that Suit pleaded

[*360] that they did not occupy any Lands within the Parish of *Leak*.

On the 1st of February 1825 the Cause was heard ; and the Defendants having given in Evidence the Decree and other proceedings in *Trinity College v. Lepton and Others* (of which they had not been able to procure Office-copies until some time in the year 1822, owing to the difficulty that was experienced in discovering where the originals were deposited) the Bill was dismissed with Costs. In 1817 *Trinity College* leased the Tithes of *Over Silton* to two Persons named *Smith* and *Horner* : in 1829 Lord *Melbourne* purchased the remainder of their Term, and after-

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wards sold his interest in the Lease to the Trustees of Lord *Fauconberg's* Will, who in 1826 took a Renewed Lease.

In April 1826 the Trustees of Lord *Fauconberg's* Will filed a Bill against the Plaintiff and *Samuel Crompton* the Younger, praying that the Indemnity Fund might be transferred to them.

The Bill in this Cause was filed in November 1826, alleging that the Plaintiff contracted to purchase the *Kepwick* Estate upon the representations made to him, by the Vendors, that it was situate within the Parishes of *Leak* and *Cowsby*, and was exempt from Tithes, and was subject only to the Moduses before mentioned: that, until after the Estate had been conveyed to him, and after the execution of the Deed-poll of October 1808, he had no notice of the Decree or any of the proceedings in the Suit of *Trinity College v. Lepton and Others*, or that the whole of the Estate was not within the Parishes of *Leak* and *Cowsby*, or that there was any ground for any claim by the College or any other Person, for any Tithes of the Estate, except *the Claim of the Vicar of *Leak*, and the [*361] Moduses. The Bill prayed that it might be declared that the Plaintiff was entitled to a Compensation in respect of the Tithes of that part of the Estate which was within the Parish of *Over Silton*; and that the amount of such Compensation might be ascertained and paid to him, out of the Indemnity Fund.

The Defendants, in their Answers, insisted that, according to the true construction of the Memorandum of the 22d of June 1808, the Plaintiff was not entitled to any relief, unless he could make out that he was not bound by the result of Mr. *Addison's* Suit, or that the part of the *Kepwick* Estate which was in the Parish of *Leak*, was liable to the payment of Tithes to the Vicar of that Parish.

Sir *E. Sugden*, Mr. *Pepys*, Mr. *Temple*, Mr. *Koe*, Mr. *Barber*, Mr. *Blunt*, Mr. *Bethell*, and Mr. *R. Atkinson*, were Counsel in the Cause (a).

The VICE-CHANCELLOR, after stating the facts of the Case, continued as follows:

Notwithstanding the precise language which was contained in the Memorandum of June, and in the Deed poll of October 1808, the mere fact that Mr. *Addison's* Suit had failed, and Dr. *Byam* had not instituted any Suit, was not considered, by any of the Parties, as terminating the question really in existence between them: and, notwithstanding the interval that took place from the death of *Addison* till November 1818, the Trust Fund *was allowed to go on accumulating. It was not until [*362] November 1818, that Mr. *Warrington* filed his Bill to which Pleas were put in averring that the Lands in question were not in the Parish of

(a) The Reporter was prevented, by illness, from attending in Court during the Argument.

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Leak. Issue was taken on the Pleas, and the truth of them being made out by production of Office-copies of the proceedings in *Trinity College v. Lepton and Others*, the Bill was dismissed with Costs, on the 1st of February 1825. One of the documents in the Box of Deeds, which was delivered to Mr. *Hirst* between the months of June and September 1808 was a copy of the final Decree in that Cause. It seems that there was considerable difficulty experienced in ascertaining where the whole of the Originals of these proceedings were deposited, and, without Copies of them nothing could be done; but, in 1822, a portion of the Documents was discovered, by Mr. *Cocker* (the Solicitor who managed the Defence) in the *Rolls Chapel*. It was not, therefore, until 1822 that there was any capability existing of proving the fact which was represented upon the copy of the Decree which was found in the Box. Mr. *Hirst* had been the Solicitor for Mr. *Crompton* at the time of the Purchase, but Messrs. *Cocker* were the Solicitors who managed the Defence in Mr. *Warrington's* Suit, and Mr. *Hirst* was merely employed by them, as their Country Agent, and Mr. *Smith*, a different person, is the Solicitor for Mr. *Crompton* in this Suit. The proceeding in *Trinity College v. Lepton and Others*, show that the Demesne Lands of *Kepwick* consist of 820 Acres, of which 580 Acres are in the Parish of *Over Silton*, 120 Acres in the Parish of *Cowsby* and 120 Acres in the Parish of *Leak*. Several Instruments were discovered in 1830, in the Muniment Room of the late Lord *Fauconberg*, [*363] of which an Abstract has been made; they were Deeds which manifest that the Title which *Lepton* had to the *Kepwick* Estate, was deduced, from him, to the Ancestor under whom Lord *Fauconberg* claimed. The question then is, upon this state of facts, whether Mr. *Crompton* is entitled to the relief he asks by his Bill.

It is perfectly plain that the transaction has never been completed; for the Purchase-money has not been paid. It was said that I am to consider the transaction as if the Purchase-money had been paid. But it is clear, as a matter of fact, that the Purchase-money is not in the hands of the Vendors; because they have themselves filed their Bill to have the Fund transferred to them. It is also perfectly plain that the Parties themselves never considered that the Vendors were entitled to the Money; because they allowed the matter to sleep, subject to such questions as might be raised, even after the death of *Addison*. And then the question is whether the original obligation on the part of the Vendors, to make good their representation, can be considered as having been destroyed, merely because the Parties have, in ignorance of the real fact, undertaken to take a special Indemnity out of the Purchase-money. Now suppose that there had been no Agreement at all with respect to the Indemnity, and a portion of the Money had been re-

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tained by Mr. *Crompton*; it appears to me that, if a portion of the Money had been retained by him simply, he would, beyond all question, have had a right to this Indemnity. The Cases of *Cator v. Lord Pembroke* (b) and *Thomas v. Powell* (c) were cited. In the Case of *Cator v. Lord Pembroke* the Court refused to give relief, because the whole Purchase-money *had been paid to the Trustees for the Vendor, and they [*364] had laid it out upon Trusts for other Persons, and not upon particular Trusts for the Purchaser. The Lords Commissioners, first, and Lord *Thurlow*, afterwards, held that the transaction was completed, and, consequently, that a Court of Equity could not relieve, but only because the transaction was completed: and, in the Case of *Thomas v. Powell*, the whole point was, what was the meaning of the stipulation, when a Purchaser pays his Money into Court, that it shall not be paid out without Notice. It was said that the real meaning of it was only to secure, to the Purchaser, a proper Conveyance; and, inasmuch as the Purchaser in that Case, had taken his conveyance and taken possession and paid his Purchase-money into Court, it was held that he could not be relieved, because the transaction was completed. In the Case of *Hill v. Buckley* (d) (which was I think, the first Case of the kind that came before a Court of Equity) a Purchaser filed a Bill, not to be relieved from a Contract, but to adopt the Contract, so far as it could be carried into effect, and then to have Compensation for the defect arising from misrepresentation. It was strongly contended, in that Case, that no relief ought to be given; but Sir *W. Grant*, M. R. thought that there ought to be a deduction from the unpaid Purchase-money, so as to put the Purchaser in that situation in which he ought to have stood, provided the nature and extent of the Property had been properly represented to him at first. Here the Purchase-money has not been paid; and I think that, unless it can be made out that the Purchaser is precluded by the terms of the Memorandum of June *the Deed of October 1808, he is entitled to the relief he [*365] asks. Then what are those terms in effect? Why all Parties being, as I believe, in utter ignorance of the real facts of the Case, (for I never can suppose that the transaction could have proceeded in the way that it did, if Sir *Geo. Wombwell* and Lord *Melbourne*, or their Agents had really known the true state of the Case, and it is perfectly manifest that Mr. *Crompton* did not know it) acted upon the supposition that there was nothing whatever to defeat the representation that the Estate was Tithefree, except the probability that the Vicar of *Leak* might succeed in the Claim that he had set up. What they meant to do, in substance, was to provide that Mr. *Crompton* should receive an Indemnity, in case the Vendor's representation should prove to be fallacious. But they were mistaken about the mode of giving

(b) 1 Bro. P. C. 301; and 2 Bro. P. C. 232.
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(c) 2 Cox, 394.

(d) 17 Ves. 394.]

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the Indemnity: they mean to give the Indemnity, and they did not exactly understand the subject, or the mode in which the Indemnity ought to be given, merely because they did not understand the facts of the Case. I mention this, because it was argued that Mr. *Hirst*, before the Indemnity was executed, knew what the real state of the Case was. It is to be observed that, even he had learnt, in the most correct manner, the contents of that part of the last portion of the proceedings in *Trinity College v. Lepton and Others*, which was in the Box, it would not decide the Case; that Copy alone would not decide it; for, upon looking at the Decree, I find that a vast quantity of Evidence was produced; so that, after all, what *Hirst* had in his possession, was a mere Notice to him that there might be some Evidence which might go to make out the Case on the part of the Defendants in the Suit instituted by the Vicar of *Leak*. I cannot therefore think [*366] that, if Mr. *Crompton* had been himself apprised of it *before the Deed-poll of October 1808 had been executed, that could be considered as, in the least, depriving Mr. *Crompton* of the relief which he asks. It appears too that a great deal of Correspondence passed, and that great difficulty was found in getting up the Evidence which was required to support the Pleas.

It was said that the Parties have not, by the Trust Deed or the Memorandum, provided that, in case it should appear that any other Person was entitled, there should be no Indemnity. It is absurd to suppose that they could do so; and I apprehend that, unless there were negative words (which it is quite absurd to suppose anybody would have used unless under peculiar circumstances) the Case comes to this: the Parties meaning, in point of justice, to provide an Indemnity against a Claim which they thought might be enforced, set apart a portion of the Fund. It turns out that the Person whom they expected might, by possibility, succeed, was defeated, and that another Person is entitled. Now, with respect to that other Person, the facts tell most strongly against the Vendors, not however so as to affect the character of any Party. The facts, as they appear upon the Evidence and admissions, are that, for a long series of years, *Trinity College* had made Leases of the Tithes of *Over Silton* to Lord *Fauconberg*. The last Lease was allowed to expire in 1819, because the Devisees in Trust of Lord *Fauconberg* thought they were not bound to renew the Lease; and the consequence was that *Trinity College*, in 1817, granted a Lease to two Persons named *Horner* and *Smith*. That must have been a concurrent Lease. In 1820 Sir *George Wombwell* purchased the remainder of the Lease from *Smith* and the Executors of *Horner*. He subsequently sold his Interest in [*367] *the Lease to the Trustees of Lord *Fauconberg's* Will; and, in 1826, the Lease was renewed, to Lord *Melbourne* and Sir *George*

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Wombwell, as such Trustees. If then there is a question who is to be bound by the possession of Documents, the obligation must fall much more upon the Vendors, who have them, than upon any other Person; and the Documents which would have made out the whole of this Case, were, in fact, in the possession of the Vendors. So far therefore from there being any doubt on this Case, it is a perfectly plain one; and I have no doubt whatever that Mr. *Crompton* is entitled to have it referred to the *Master* to ascertain what is the amount of Compensation that he ought to receive in respect of Tithes being payable to *Trinity College* for so much of the Farm as is proved to be in *Over Sillon*.

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[*368]

1832: 19th and 18th July.—*Tithes.—Modus.—Evidence.—Terriers.*

In a Suit for Tithes by an Ecclesiastical Rector against the Occupiers, a Terrier signed by the Vicar, Churchwardens and Inhabitants, and which was tendered by the Defendants, was rejected. Old Accounts found in the Custody of the Personal Representative of a deceased Tithe Collector of a former Rector, were received, although there was no Evidence to show by whom they were made out. The Defendants set up a Modus of 1*l.* 17*s.* 9*d.* as covering the Tithes of Four Townships in a Parish, which were claimed by the Plaintiff. The latter proved, by Documents older than those produced by the Defendants, that separate Moduses, amounting to 1*l.* 17*s.* 9*d.*, had been paid for separate portions of the Four Townships. Held that the Modus pleaded, was bad.

THE Plaintiff was the Rector of the Parish of *Kirkby in Cleveland*, otherwise, *Kirkby-cum-Broughton* otherwise, *Kirby* in the County of *York*. The Parish is divided into the five Townships or Hamlets of *Kirby Proper*, *Great Broughton*, *Little Broughton*, *Great Dromonby* and *Little Dromonby*. The Defendants were occupiers of Lands in the four last-mentioned Townships. The Rectory is Ecclesiastical; and the Vicarage is in the Gift of the Rector. In 1824 a Suit was instituted, in the Court of Exchequer, by Mr. *Willis*, the Vicar, against several Occupiers of Lands in the five Townships, claiming Agistment and other Tithes. Mr. *Willis* obtained a Decree for an Account of the Agistment Tithe in the Township of *Kirby*; and an Issue was directed to ascertain whether he was entitled to that Tithe in the four other Townships. The Issue was tried, at the Spring Assizes for the County of *York*, in the year 1829, when a Verdict was found for the Plaintiff. A new Trial, however, was directed; and, at the Spring Assizes for 1830, a Verdict was found for the Defendants: and on the 17th of July in the same year, the Bill, so far as it sought an Account of the

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Tithes of Agistment within the four Townships, was dismissed with Costs(a).

[*369] *The Bill in this Cause was filed in November 1830, praying for an Account and Payment of the Tithes of Hay and Agistment within the four Townships. The Defendants pleaded a Modus of 1*l*. 17*s*. 9*d*. to be payable to the Rector, for the Tithes claimed, on Good Friday in each year, by the Occupiers of Lands in the four Townships.

The evidence for the Plaintiff consisted of Extracts from the *Nona Roll*, *Pope Nicholas's Taxation*, and the *Ecclesiastical Survey*, 26 Hen. 8, and of several Terriers, dated in 1685, 1716 and 1727, some of which were signed by the Vicar and Churchwardens, and others by the Vicar, Churchwardens and some of the Inhabitants; and also of Modus Accounts and Receipts found in the custody of the Personal Representative of *R. Greenside*, who had been Tithe Collector to a former Rector, and some of which were in his own hand writing, and others were signed by Persons who were *alleged* to have been his Predecessors. The two earliest Terriers stated that the Composition Money was payable to the Rector yearly, on Good Friday, for Tithe Hay, throughout the Parish, except *Kirby*, and was reputed to amount to between 30*s*. and 40*s. per annum*. The Terrier of 1716 stated a customary Rent of 12*s*. 8*d. per annum* to be paid, to the Rector, in lieu of Tithe Hay, in *Great and Little Dromonby*; 8*s*. 3*d. per annum*, in lieu of the same Tithe, in *Little Broughton*; and, in *Great Broughton*, 4*s. per annum*, in lieu of the Tithe Hay for all the Grange Land, 3*d. per Oxcgang* in lieu of Tithe Hay for the Land on the King's Hold, and 1*d. per Oxcgang* in lieu of the same Tithe for the Land on *St. John's* Hold, and 1*d. per Cottage*.

[*370] *The Terrier of 1727 was as follows:—"Item, prescription Money paid upon Good Friday in *Kirby* Church Poreh in lieu of Tithe Hay throughout the whole Parish, except *Kirby*; which said Prescription Money is 8*s*. 3*d.* in *Little Broughton*, and 1*s.* the Mill Tithe per annum, and in *Great Broughton*, 3*d. per Oxcgang* for that on the King's Hold, and 1*d. per Oxcgang* for that on *St. John's* Hold, and 1*d. per Cottage*.

The Counsel for the Defendants objected to the admissibility of such of the Modus Accounts, as were dated prior to *Greenside* being appointed Tithe Collector, on the ground that there was no Evidence to show who the Persons were whose Names were subscribed to them, or that those Accounts had ever been in *Greenside's* possession.

But the *Vice-Chancellor* said that the Papers were admitted to have come out of the possession of the Personal Representative of a Person who had been the Tithe Agent of the Rector; and that Papers of the description which they appeared to be, coming out of such Custody, ought to be received in Ev-

(a) See *Willis v. Farrer*, 2 Youn. & Jer. 217, and 3 Youn. & Jer. 264, 381.

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idence ; because a subsequent Tithe Collector was the natural depository of Papers which show the Receipt of the Tithes by Persons at an earlier period.

The Papers in question were accordingly read : the Payments mentioned in them tallied with those mentioned in the Terriers, and amounted to 1*l.* 17*s.* 9*d.*

*The Evidence for the Defendants consisted ; 1st, Of the De- [*371] positions in *Willis v. Farrer* (b), in which the Witnesses deposed to the Modus being payable as pleaded in the Answer, both from their own knowledge, and from what they had heard from deceased Inhabitants of the Parish. 2dly, Of three Terriers dated in 1764, 1770 and 1777, and signed by *T. Murgatroyd*, Rector, *W. Ellis*, Vicar, and by the Churchwardens and some of the Inhabitants, and which stated that a Modus of 1*l.* 17*s.* 9*d.* or thereabouts, was payable, on Good Friday, in *Kirby* Church Porch, for the Tithe of *Hay* throughout the whole Parish, except within the Township of *Kirby*. 3dly, Accounts from 1740 to 1812, in the hand-writing of *Greenside* and other Tithe Agents of the Rectors for the time being, which were headed as Accounts how the Modus in lieu of Tithe Hay and Grassing Ground, or Tithe Hay and Agistment, had been paid in *Kirby* Church Porch, every Good Friday, time out of mind, and which contained the Names of the Occupiers and the small Sums payable by them severally, which amounted, in the whole, to 1*l.* 17*s.* 9*d.* 4thly, A Book in Mr. *Murgatroyd's* hand-writing, and an Order, signed by him, dated 18 July 1770, and directing *Greenside* to pay, to Mr. *Ellis*, the 1*l.* 17*s.* 9*d.* which *Greenside* had received for *Murgatroyd*, on Good Friday then last, and a Receipt for the same Sum, signed by *Ellis*.

Other Terriers were tendered by the Defendants, some of which were signed by the Vicar, Churchwardens and Inhabitants, and the rest by the Churchwardens and Inhabitants alone. The Plain- [*372] tiff's Counsel objected to their admissibility, on the ground that they were not signed by the Rector, and, therefore, ought not to be used against him. The Counsel for the Defendants cited *Potts v. Durant* (c) and *Illingworth v. Leigh* (d). The Plaintiff's Counsel replied that, in this Case, the Vicar had claimed adversely to the Rector ; that, in *Potts v. Durant*, the Rector was a Party to the Record, not as Rector, but as a Proprietor of Lands in the Parish ; that, according to the Rules of Pleading, the Rector would not have been a proper Party, as Rector ; that here the Rector was a proper Party to the Record, in that character ; that in *Illingworth v. Leigh*, the Terrier was tendered on behalf of the Vicar ; that a Terrier was not Evidence of Reputation, but as a Declaration by a Party in

(b) These Depositions were read by agreement between the Parties.

(c) 8 Anst. 789.

(d) Gwill. 1615.

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pari Jure ; and that it was a Statement made for the purpose of being Evidence, and did not flow from the mind of the Party, in the ordinary course of his Life, and when he has no motive to speak anything but the Truth.

The VICE CHANCELLOR :

I think that, on Principle, these Terriers ought not to be received. In Questions of Pedigree, Narratives are admitted as being Representations made by a Party, who has no bias on his mind, as to the state of his family. But Terriers are made under such circumstances as that there must be a bias of mind either on one side or the other ; and it would be extraordinary that a Person who is absent from the Declaration, should be bound by it, as it is not made in the way of casual conversation, but for the express purpose of adjudicating on the Rights of the absent Party. In [*373] *this case, where the Rector is a Spiritual Rector, the reason for rejecting the Terriers is stronger than where he is a Lay Impropriator ; for a Spiritual Rector is bound to reside, and, therefore, may be presumed to have been on the spot ; and, consequently, his Signature ought not to be dispensed with.

Sir E. Sugden, Mr. Knight, Mr. Boteler and Mr. Faber, for the Plaintiff, said that all the old Documents mentioned Tithe Hay only, as being covered by the Modus ; that the modern Evidence extended it to Agistment, which was clearly an Encroachment ; that it appeared that 1*d.* was payable for every Cottage ; but that the Payment could not be any part of the Modus of 1*l.* 17*s.* 9*d.* which was alleged to be payable for Tithe of Hay and Agistment ; that the Sums mentioned in the Accounts produced by the Defendants, could not be the proportion which each Individual contributed to the alleged Modus, according to the extent of his Lands, for 3*d.* per Oxgang was payable for the land on the King's Hold, and 1*d.* per Oxgang for the Land on *St. John's* Hold, and it appeared that a person, who was a large Proprietor, paid 1*d.*, and a Cottager paid 1*d.* also ; that the Defendants had pleaded one entire Modus as covering the whole of the four Townships, but that it was proved that separate Sums were payable for separate Parts of the Townships ; and consequently that the Defendants had not supported their Modus as laid.

Sir C. Wetherell, Mr. Simpinson and Mr. Wright, for the Defendants, said that the Heading of the Accounts, and the Receipts which [*374] the Defendants had *given in Evidence, showed that the Modus was one entire Modus, though it was afterwards subdivided by the Occupiers, as amongst themselves, and that it covered the Tithe of Agistment, as well as of Hay ; and that that Evidence was corroborated by the Depositions : that there were many Cases in which the strict, natural meaning of words, used in Instruments similar to those produced for the

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Plaintiff, had been controlled by usage, and in which a Modus for the Tithe of Hay, had been held to cover the Tithe of Agistment, *Manby v. Lodge* (e), *Pritchett v. Honeyborne* (f), *Gibson v. Peacock* (g), *Willis v. Farrer* (h), *Stuart v. Greenall* (i) : that the Defendants' Terriers showed that one, entire Sum was paid as a Modus, and *Murgatroyd's* Order showed that he adopted it : that the parties who set up an aggregate Modus were not bound to show more than that the aggregate Sum had, in some shape or other, been paid for the whole District which it was alleged to cover, and that they were not bound to account for the Apportionment of the Sum amongst the Occupiers : that the Documents produced by the Plaintiff were not inconsistent with the Modus as laid ; and that, at all events, the Defendants had made out a sufficient Case to entitle them to an Issue.

The VICE-CHANCELLOR, after stating the object of the Bill, and the Modus as laid in the Answer, proceeded thus :—In support of the Modus so laid, the Defendants have entered into Evidence, which partly consists of the Depositions in *Willis v. Farrer*, and partly of [*375] three Terriers dated in 1764, 1770, and 1777, in all of which, without any material variation, it is stated that there is a Modus of 1*l.* 17*s.* 9*d.*, or thereabouts, yearly to be paid upon Good Friday, in *Kirkby* Church Porch, for the Tithe Hay, throughout the whole parish, except within the Township of *Kirkby*. The Defendants have produced a great quantity of other Documentary Evidence to show that, from 1746, various Sums have been received for Tithe Hay and Agistment, which, in the aggregate, amount to 1*l.* 17*s.* 9*d.*, and therefore there seems to be some precision given to the Payment of the 1*l.* 17*s.* 9*d.* beyond what is stated in the Terriers. It is observable that, in the Accounts, 1*d.* is, in some instances, mentioned to be payable in respect of a Cottage. I quite agree with the Defendants' Counsel that if there were nothing more in this Case, it would be a matter of course not to decide against the Defendants : but, if the Rector pressed for an Issue, to grant it, and, if he did not, to dismiss his Bill.

The Modus which is laid, is a Modus of 1*l.* 17*s.* 9*d.*, payable by the Occupiers, for the Tithes of Hay and Agistment in the four specified Hamlets. The Plaintiff undertakes to show the origin of this alleged uniform Payment, and to make out that, though there had been this continued payment of 1*l.* 17*s.* 9*d.*, it was not a Payment of the gross Sum for the Tithe of Hay and Agistment for the four Townships, but that it is to be attributed to a collection of ancient customary Payments made in respect of *Great Dromonby*, *Little Dromonby* and *Little Broughton*, and, in *Great Broughton*, for the

(e) 9 Price, 231.

(f) 1 Youn. & Jer. 135.

(g) 1 Youn. 184.

(h) *Ubi Supra*.

(i) 9 Price, 106.

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Grange, the Lands on King's Hold and *St. John's* Hold, and in [*376] respect of Cottages. And, if the Plaintiff *can show that the 1*l.* 17*s.* 9*d.* is to be referred to a collection of customary Payments, in respect of Divisions of Lands such as I have mentioned, that would be utterly inconsistent with, and destructive of the Modus as laid in the Answer; and then I should not be at liberty to direct an Issue to try the truth of the Case which he makes out, because the Defendants have not attempted to meet that Case. But, instead of laying the Modus separately for distinct Lands, the Defendants have laid a Modus of one entire Sum for the whole four Townships.

The Question then to be considered is, what Evidence the Plaintiff has produced to prove the existence of these separate, ancient Payments, which might have given rise to the one annual Payment of 1*l.* 17*s.* 9*d.* The Plaintiff produces a Terrier of 1685, in which it is stated that the Composition Money payable to the Rector, for Tithe Hay throughout the parish except *Kirkby*, is reputed to amount to between 30*s.* and 40*s.* All that can be collected from this Document is, that the Parties who signed it were not agreed as to the exact amount of the Composition Money. But then, the Terrier of 1716 mentions that a customary Rent of 12*s.* 8*d.* per annum is paid to the Rector, in lieu of the Tithe Hay in *Great* and *Little Dromonby*, &c. &c. So that, if there were any Documents which would show the number of Oxgangs on King's Hold and *St. John's* Hold, and the number of Cottages, means would be supplied by which the amount of the customary Payments mentioned in the Terrier, might be ascertained. The Terrier of 1727 coincides, to a certain extent, with the Terrier of 1716; [*377] and, if it could be shown that there *were payments made such as this Terrier of 1727 represents, they would be inconsistent with the Modus as laid by the Defendants.

It is hardly worth while to make observations upon the *Nona Roll* and the Ecclesiastical Survey of Henry the 8th; but, as far as they go, they appear to support the Plaintiff's Case, though I do not consider them of much weight.

The next body of Evidence produced by the Plaintiff, is a set of Papers which were admitted to have come out of the possession of the Personal Representative of the Tithe Agent of the Rector of the Parish. Those Papers tend to show that the divided payments, which are stated in the Terriers of 1716 and 1727, were actually made; because, in some of them, payments are mentioned to have been made for the Lands in *Great Dromonby*; and others of them mention payments to have been made in respect of the Lands in *Little Dromonby*, which payments together would amount to the 12*s.* 8*d.* which the Terrier of 1716 shows to have been pay-

1832.—Harcourt v. Peirson.

able for *Great and Little Dromonby*. Then there is a Paper, signed by *Richard Appleton*, in the following words :—"Received on Good Friday, being March 31st, 1738, of the Inhabitants of *Great and Little Broughton*, their ancient *Modus decimandi*, or immemorial Custom Money paid in lieu of Tithe Hay on the old Grassing Part, namely, the Modus for *Little Broughton*, 8s. 3d., the Modus for *Great Broughton Grange*, 4s., and for the Remainder of the Oxgangs of the King's Hold, 9s. 3d., and for the Oxgangs of *St. John's* Hold, 19d., and for the Cottages, 2s. I say received as aforesaid for the whole Constabulary, 1l. 5s. 1d., by me *Richard Appleton*. *And received also at the same time and [*378] place, and by the same order, the Sum of 12s. 8d., being the ancient Modus for both *Dromonbys*." Then the 12s. 8d. added to the 1l. 5s. 1d. makes the aggregate of 1l. 17s. 9d. Then there is another Modus Paper, which is in these words :—*Little Broughton*, 8s. 3d., *Grange*, 4s., Remainder of King's Hold Oxgangs, 9s. 3d.; total, 1l. 5s. 1d. Both *Dromonby's* 12s. 8d.—£1. 17. 0. total Modus."

This Evidence is good Evidence for the Defendants to show that there was a payment of 1l. 17s. 9d.; but it is also Evidence for the Plaintiff to explain of what Items the payment of 1l. 17s. 9d. was composed. Then there is another Paper dated in 1737, and which is as follows :—"Whereas the immemorial Custom, or *Modus decimandi*, whereby the Inhabitants within the Constabulary of *Broughton*, have ever paid to the Rector or his Order, in the Church Porch of *Kirkby*, on every Good Friday, as followeth :—The *Grange* Modus, being for 15 Oxgangs of Land in King's Hold, 4s.; for 37 Oxgangs of the King's Hold, at 3d. per Oxgang, paid by the Possessors thereof, 9s. 3d.; for 24 Cottages in *Great Broughton*, at 1d. per Cottage, 2s.; for 19 Oxgangs of *St. John's* Hold, at 1d. per Oxgang, within the Lordship of *Great Broughton*, 1s. 7d.: at the same time and place, by the Inhabitants and Possessors of and for the Lordship of *Little Broughton*, 8s. 3d." And these same Payments are mentioned in other Papers produced by the Plaintiff, all of which are anterior in date to the year 1740; and they satisfactorily make out that, consistently with the Defendant's Case of the payment of an annual Sum of 1l. 17s. 9d., there had been the prior practice of paying the several different Sums *that [*379] I have mentioned, and which are stated in the Terrier of 1716, not in respect of the whole four Townships together, but in respect of the *Dromonbys* and *Little Broughton*, and those separate Portions of *Great Broughton*, which are called the *Grange*, the King's Hold and *St. John's* Hold, and also the 24 Cottages. I think, therefore, that, quite consistently with the Defendant's Case, which rests upon the fact that there has been a long-continued annual Payment of 1l. 17s. 9d., the Plaintiff shows that that

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Payment ought not be referred to a Modus in respect of the whole four Townships, but to a collection of Payments which, for a greater or less length of time antecedent to the year 1710, have been paid, in several Sums, in respect of several Portions of Land, then, perhaps, well known, but not now to be ascertained, and also in respect of Cottages. Consequently, this is not a Case in which there is any conflict of Evidence; but the Plaintiff's Case is consistent with the Defendant's; and the Plaintiff has not displaced the matter of fact which constitutes the Defendant's Case, but has only explained how the Defendant's Case appeared to be such as it is: and my opinion is that this is not a Case in which I ought to send any matter to be inquired of by a Jury; for it is perfectly plain that, though there has been a long-continued annual Payment of 1*l.* 17*s.* 9*d.*, it cannot be referred to a Modus in respect of the four Townships: and, if this Case went before a Jury, and they should find that there is such a Modus, it would be my duty to grant a new Trial. I am of opinion, therefore, that the Defence has totally failed, and that there must be a Decree for Tithes, with Costs.

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*BAKER *v.* MARTIN.1832: 20th June.—*Account.*—*Master.*—*Debt.*

Where under the usual Decree for an Account of a Testator's Debts, a claim is made in respect of a Debt the Amount of which is not ascertained, the *Master* ought to take the necessary Accounts for ascertaining the Amount.

MESSRS. *Horn & Jackson* having been declared Bankrupts, under a Commission dated the 26th of July 1806, *James Baker* and *Randle Hopley* were chosen their Assignees, and the usual Assignment was made to them, on the 26th of August 1806, by which they covenanted, for themselves, their Executors and Administrators, with the Commissioners, to account for and pay to them all Monies which they, the Assignees, should receive from the Estate of the Bankrupts, to the end that the same might be distributed amongst the Creditors. On the 18th of August 1811, *Baker*, who was the sole acting Assignee, exhibited his Account before the Commissioners. On the Credit side of the Account, there were various Items to the amount of 2,723*l.*, which the Commissioners refused to allow until they had been submitted to a meeting of the Creditors, for their approbation; but they permitted *Baker* to retain the amount, in his hands, in the mean time. *Baker* died in July 1822, having appointed his Sons, *William* and *John*, and *Charles Martin*, his Executors. No meeting of the Creditors was called, in

1832.—Baker v. Martin.

Baker's lifetime, in pursuance of the Resolutions of the Commissioners, and the 2,723*l.* remained, at his death, disallowed by them as before mentioned. On the 1st of July 1828, *S. Vachell* was appointed an Assignee in *Baker's* place, and, on the same day, the outstanding Estate of the Bankrupts, was assigned to him and *Hopley*. Some time afterwards, *John Baker*, having been examined, before the Commissioners, touching his late Father's Accounts, stated that he knew nothing of them. In February 1830, the Commissioners authorized *Hopley* and *Vachell* to institute a Suit against the Executors of *James Baker* *for recovering the Bal- [*381]
 ance due from him, at his death, to the Estate of the Bankrupts; and, in March 1830, a Bill was filed accordingly. *William* and *John Baker* stated, in their Answers to it, that, before they were informed of the Claim, they had divided the whole of their late Father's Estate, amongst the Persons entitled under his Will, with the exception of 5,872*l.* Three per cents, which, on the 9th of March 1829, they had transferred into this Court, in trust in the Cause of *Baker v. Martin*. The Assignees, having made inquiries respecting that Suit, discovered that, on the 5th of May, 1830, a Decree had been made in it, directing the usual Accounts to be taken of *James Baker's* Personal Estate, and of his Funeral and Testamentary Expenses, Debts and Legacies. *Vachell*, who had survived *Hopley*, caused a Charge to be prepared for the 2,723*l.*; but, owing to his illness, and to his death in July 1831, the Charge was not, as had been intended, carried in under the Decree. Sir *G. Wilson*, the surviving Commissioner under the Commission, having ceased to act as a Commissioner, a renewed Commission was issued on the 17th of November 1830, under which *P. W. Mure* was chosen Assignee; and, on the 17th of January 1832, a Charge was carried in before the *Master*, on his behalf, claiming to be admitted as a Creditor under the Decree, for the 2,723*l.* The *Master* declined to proceed on the Charge, stating that the Debt sought to be proved, depended upon the result of *James Baker's* Accounts, as Assignee, and that he had no authority, under the Decree to take those Accounts. In May 1832, the Bill filed by *Hopley* and *Vachell*, was dismissed.

Mr. *Knight*, and Mr. *Lovat*, for *Mure*, now moved that the *Master* might be directed to admit him, as *Assignee, and Sir [*382]
G. Wilson, as the surviving Commissioner, or one of them, to go in before him under the Decree, to prove such Debt as they or he should be able to establish to be due from the Testator *James Baker*, to the Estate of the Bankrupts; and, if necessary, that the *Master* might be directed to take an Account of the Testator's Receipts and Payments, as Assignee. They said that, where the amount of a Debt claimed to be due from a Testator's

1832.—Trotter v. Trotter.

Estate, could not be ascertained without taking an Account, it was the Master's duty to take it. *Paynter v. Houston* (a).

The *Solicitor-general*, Mr. *Pepys* and Mr. *James Russell*, for the Parties in the Cause, contended that the Assignee had been guilty of laches and acquiescence, and that the Debt sought to be established, became a simple Contract Debt, at the Testator's death, and, therefore, was barred by the Statute of Limitations.

Mr. *Knight*, in reply, said that under the Covenant in the Assignment of August 1806, the Debt was a Specialty Debt, and that Sir *G. Wilson* was a Trustee for *Mure*, under that Covenant.

THE VICE-CHANCELLOR :

The Testator was in the situation of a Trustee for the Creditors of the Bankrupts. How then can the lapse of time, either in his lifetime, or since his death, affect the Debt? I cannot but think that I ought not to deprive the Bankrupts' Estate of the Benefit that may arise from this Claim being carried in before the Master, and that the Master was wrong in refusing to take the Account.

Ordered according to the Notice of Motion.

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*TROTTER v. TROTTER.

1832 : 25th June.—Practice.—Evidence before the Master.—New Orders.

The discretion given to the Master, by the 69th Order, to examine Witnesses *viva voce*, cannot be exercised after issuing the Warrant on preparing his Report.

THE Defendant having refused to allow Evidence to be given before the Master by Affidavit, the Plaintiff had examined Witnesses, on Interrogatories, under the Decree, and Publication had passed by Warrant taken out by the Plaintiff, and Copies of the Depositions had been delivered to both Parties, and read before the Master. The Plaintiff then took out a Warrant on preparing the Report, which was prepared accordingly. The Plaintiff afterwards tendered an Affidavit, made by a Person named *Vargon*. The reception of this Affidavit being objected to, the Master, conceiving that the 69th of Lord *Lyndhurst's* Orders gave him power, at his discretion, to examine any Witness *viva voce* proceeded to examine *Vargon*, and took down his Deposition.

Mr. *James Russell* now moved that the Deposition might be suppressed

(a) 3 Mer. 227.

1832.—Le Gros v. Cockerell.

for Irregularity, contending that, both in respect of Publication having passed, and also under the 67th Order, the *Master* could not, in that stage of the proceedings in the Cause, receive any further Evidence.

Mr. *Knight* and Mr. *Phillimore*, *contra*, said that the *Master* took the Examination of *Vargon* for his own satisfaction, and that when, looking at the previous Evidence, he came to the conclusion that it was desirable that further Evidence should be gone into, he had power to obtain it under the 69th Order, though it would have been too late for [*384] any of the Parties to require him to enter into it on their behalf.

The *Vice-Chancellor* held that the *Master* had no power, in the existing state of the Proceedings, to go into further Evidence, and ordered the Deposition to be suppressed; but, as it had been taken at the suggestion of the *Master*, whose misapprehension had occasioned the Motion, His *Honor* did not make any Order as to Costs.

LE GROS v. COCKERELL.

1832: 23d July.—Will.—Construction.—Foreclosed Mortgage.

Testator having a foreclosed Mortgage in Fee, of certain Farms in *Lancashire*, gave amongst other things, to his Wife, for Life, "the Interest or Proceeds of certain Farms in the County of *Lancaster*, mortgaged to me for 2,500*l*."; and, after her decease, "one Third Part of the Sum of 2,500*l*. principal Money disposed of in mortgage of the Farms aforesaid "to his Daughter *Harriet*; and he declared that after his Wife's decease, his Daughter *Elizabeth* should inherit and enjoy the *Bequests* aforesaid in the same proportion as her Sister *Harriet*; and that his Son should in like manner inherit and enjoy one Third Part of the aforesaid *Bequests*, upon the same conditions as his Daughters: Held that the Farms passed, as Real Estate, to the Testator's Wife, for Life, with Remainder to his Son and Daughters, as Tenants in Common in Fee.

By an Indenture, dated the 26th of March 1776, *William Barton* assigned to Trustees the Sum of 4,000*l*., to which he was entitled, but which then was in the hands of his late Father's Executors, in Trust to pay the Sum of 2,000*l*., part thereof, to his Wife *Harriet Barton*, or as she should appoint, and the remainder to his two Daughters, *Harriet* and *Elizabeth*, at 21 or marriage. The 4,000*l*. was not paid to the Trustees, but, by the order of *William Barton*, was received by his Brother, *James Barton*.

By Indentures of the 22d and 23d of April 1790, *James Barton* mortgaged certain Freehold Farms situate at *Farrington* in the County of *Lancaster*, to *William Barton* in Fee, for securing the [*385] Repayment with Interest, of 2,500*l*. part of the 4,000*l*. The Interest, being in arrear, *William Barton*, on the 12th of November 1791,

1632.—*Le Gros v. Cockerell.*

filed a Bill of foreclosure in this Court, against *James Barton*, and obtained a Decree, which was made absolute on the 29th of July 1795.

William Barton, who was residing at *Copenhagen*, made his Will dated the 15th of March 1798, and which was executed and attested so as to pass Freehold Estates, and was, partly, as follows :

“ I now proceed to will and bequeath all the Property I may die possessed of after first paying my legal Debts and Funeral Expenses, as follows ; viz. I will and bequeath to *Harriet* my Wife for her natural life the Interest of my Property in the English Funds, 36,291*l.* 15*s.* 6*d.*, in Trust at this present time, with* ”

Item for her natural life the *Interest or Proceeds of certain Farms in the County of Lancaster, mortgaged to me for 2,500*l.**, the Documents whereof are now in the possession of*

Item for her natural Life, the use and residence of my Dwelling-house, No. 19, *Devonshire-place, London*, value to me 3,400*l.*, the Documents whereof are now in the hands of*

Item all her Paraphernalia with Plate, Household Furniture, [*386] Coach, &c. in *London* at her own free disposal. *It may be taken for granted that the aforesaid Bequests to *Harriet* my Wife are ample and liberal when it is considered she will at my decease come into the possession of the whole of the Interest of a capital Sum in *Bengal* which by certain Deeds was settled upon *Harriet* my Wife and my Daughters *Harriet* and *Elizabeth*. And I hereby declare it to be my Will that all the *Bequests* aforesaid, with exception to the Articles left to the free disposal of *Harriet* my Wife shall after her demise be disposed of in manner following: to my Daughter *Harriet Silberschildt* one Third part of my Property in the English Funds as aforesaid the Principal Money to be so settled and secured upon *Harriet* and her Children lawfully begotten as to put it out of the power of her Husband Captain *Jacob Frederic Silberschildt* to touch a Shilling of it. Item one Third part of the value of my Dwelling-house in *London*, when sold without restriction. Item, one Third part of the Sum of 2,500*l.* Principal Money disposed of in Mortgage of the Farms aforesaid in like manner. To my Daughter, *Elizabeth Le Gros* I hereby declare it to be my Will she shall inherit and enjoy after the demise of *Harriet* my Wife all the *Bequests* aforesaid in the same proportion and upon the same Conditions as granted to her Sister *Harriet Silberschildt* with this special difference only that as my Daughter *Elizabeth* has, as yet no Child or Children nor likely to have I hereby Will that on her demise without Child or Children by *William Le Gros* the one Third aforesaid in the English Funds shall revert to and become the Prop-

* Blanks were left in these places, in the Will.

1832.—*Le Gros v. Cockerell.*

erty of my Heirs at Law; but in case my said Daughter is disposed to take a second Husband, the said one Third shall be settled and secured in like manner as above with Reversion to her second Husband for his natural life and their Children lawfully begotten *and that in de- [*387] fault of Children to revert to my Heirs at Law. And I hereby declare it to be my last Will that my Natural Son *William Haldane Burton*, shall in like manner inherit and enjoy one Third part of the aforesaid Bequest upon the same Conditions as to my Daughters *Harriet* and *Elizabeth* with this only difference that his Third part of the said Bequests shall be at his own free disposal when 18 years of age."

The Testator afterwards made five Codicils to his Will. The second was dated *Copenhagen*, 21st of April 1798, and was signed by the Testator, but not attested. It was partly as follows: "I hereby cancel and do away all the several Bequests made to *Harriet* my Wife in the body of this my last Will, and I further will and direct by this Codicil that the said Bequests go to my Heirs at Law."

The Third Codicil was dated *Harochholm*, 1st July 1798, and was also signed by the Testator, but not attested. It was, partly, as follows: "I declare it to be my Intention and Instruction that the Bequests to my Daughter *Elizabeth* in the body of this my last Will left at her free disposal with a view that her Husband should personally benefit by them shall by this my Third Codicil be done away, that is to say the said Bequests to be laid under the same restriction with the rest as particularly specified in the body of my last Will; and it is my deliberate Intention and Instruction that my Nephew and Son-in-Law *William Le Gros*, be cut off as to everything that concerns him personally."

The Testator died, at *Copenhagen*, on the 24th of April 1829, leaving his Wife and two Daughters surviving him. They afterwards died; and the Suit was *instituted, in February 1832, by *Rich-* [*388] *ard Le Gros*, the Personal Representative of both Mr. and Mrs.

Le Gros, against the Persons who claimed to be interested, under the Parties named in the Will, in the Farms of which a Mortgage had been made, to the Testator, for 2,500*l.*, but which he afterwards foreclosed. The object of the Suit was to have the Rights and Interests of the several Parties, in the mortgaged Property, ascertained and declared, some of them contending that it was to be considered as part of the Personal Estate of the Testator, and others, that it was to be considered as part of his Real Estates (a).

(a) The question in this Cause was decided by Sir *W. Grant*, M.R. in *Silberschildt v. Schiott*, 3 V. & B. 45: but, as the Decree in that Cause was not drawn up, it was considered useful to report the Judgment of the *Vice-Chancellor* upon the same question.

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Mr. *Pepys* and Mr. *Walker*, for the Plaintiff, who was the Personal Representative of Mr. and Mrs. *Le Gros*, said that the Testator had a right to consider the mortgaged Estate as Personal Property, if he chose so to do : that it appeared, by the manner in which he spoke of it in his Will, and, by his contemplating that *William Haldane Barton* would have power to dispose of it at the age of 18, that he did choose to consider the Estate as personal Property ; and that, it being competent to the Testator to revive the Debt in the nature of a Charge, the effect of the Will was only to dispose of a Charge upon the Estate.

Sir *E. Sugden*, Mr. *Treslove*, Mr. *Knight*, Mr. *Lovat*, Mr. *Wray*, Mr. *Kindersley*, Mr. *Cockerell*, Mr. *Russell*, Mr. *Hall* and Mr. *B. Anderdon* appeared for the several Defendants.

[*389] In the course of the Argument, The *Vice-Chancellor* asked whether the Settlement of March 1776, was before Sir *W. Grant* : the Counsel for the Plaintiff answered that it was not. His *Honor* afterwards observed that the Will was made in direct defiance of the Settlement of 1776, as it gave the 2,500*l.* to the Testator's Son and Daughters, in Thirds.

The VICE-CHANCELLOR :

The Testator, by the Order made in the Foreclosure Suit, became the absolute Owner of the Farms in question ; and he did not do any act by which the Foreclosure was opened. It is quite clear that he was not skilled in the English Language, or in the use of Law Terms. Being then, at the date of his Will, seised in Fee of the Farms, he first gives his Funded Property to his Wife, for her Life ; and, in the next Sentence, he uses Words which clearly give her a Life Interest in the Farms of which he was so seised in Fee. He next gives to her his Dwelling-house in *London*, and some other Articles and he then says : " And I hereby declare, &c." It appears that he meant to make a distinction between the mode in which the one Third of his Property in the Funds, and the one Third of the produce of his Dwelling-house, should be enjoyed by his Daughter, *Harriet*, and that she should take the former subject to restriction, and the latter without restriction. I think that the natural construction of the Sentence, requires that the Words " in like manner," should be taken as part of the Sentence which gives the one Third part of the 2,500*l.* to *Harriet*, and that they mean " absolutely." What then is given ? Shall the Testator be taken to give that which he had, or that which he had not ? It is more likely that he intended to de-

[*390] scribe that " which did, than that which did not exist ; and I think that the words : " one Third part of the Sum of 2,500*l.* Principal Money disposed of in Mortgage of the Farms aforesaid," are quite sufficient to describe the one Third of the Farms in which he had previously given a Life Interest to his Wife. The Testator then declares that his Daughter,

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Elizabeth Le Gros, shall inherit and enjoy, after the demise of his Wife, all the Bequests aforesaid. Now one of the subjects of those Bequests, was a Life Interest in the Farms, which he had given to his Wife; and it is something in favour of the construction which I think ought to be put upon the expressions in the Will, that the Testator has used the word "Inherit."

Declare that the Estate in question was Real Estate, and that it passed, under the Will of the Testator, to his Widow for Life, with remainder to his Daughters, *Harriet Silberschildt* and *Elizabeth Le Gros*, and his Natural Son, *William H. Barton*, as Tenants in Common in Fee.

*SMITH v. BIGGS.

['391]

1832: 6th July.—Evidence.—Bankrupt.

In a Suit by the Assignees of an uncertificated Bankrupt, for the recovery of Property fraudulently delivered by him to the Defendants, the Plaintiffs read the Examination of one of the Defendants taken before the Commissioners on the first day, but declined to read the Examination taken on the second day. Ruled that the whole must be read.

A Plaintiff cannot read the Cross-examination of one of the Defendant's Witnesses, if the Defendant declines to read the Examination in chief.

The consent of the Creditors of a Bankrupt to the institution of a Suit by his Assignees, though filed amongst the Proceedings in the Bankruptcy, must be proved.

The Evidence of a Bankrupt which, in one respect, is in his own favour, but, in another respect, against himself, is receivable.

THE Plaintiffs were the Assignees of *T. C. Biggs* an uncertificated Bankrupt; and the object of the Suit was to recover from the Defendants, certain Bills of Exchange and Shares in an Assurance Company, which the Bankrupt, in contemplation of his Bankruptcy, had delivered and transferred to them, in satisfaction of Debts alleged to be due to them. The Plaintiffs read, as part of their Evidence, the examination of *Elizabeth Biggs*, one of the Defendants, taken under the Commission. After they had read her Examination on one day, they proposed to stop, and not to read her Examination on a subsequent day. But, to this, the Defendant's Counsel objected.

And the *Vice-Chancellor* ruled that the Examination taken on the subsequent day, was a continuation of the first day's Examination, and therefore that the Plaintiffs must read the whole of it.

A Witness had been examined in chief, for *Woodman*, one of the Defendants, and the Plaintiffs had cross-examined him. The Plaintiffs' Coun-

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[*392] sel were proceeding *to read the Cross-examination ; but the Counsel for *Woodman* objected, saying that he did not intend to read the Examination in chief.

The *Vice-Chancellor* said that nothing was regarded as Evidence in this Court, but what was read ; and, if it was not read, it was not noticed in the Decree ; and that if the Defendant did not intend to read the Examination in chief, the Plaintiffs were not entitled to read the Cross-Examination.

In the course of the Argument, the Defendants' Counsel asked whether, the consent of the Creditors to the institution of the Suit, had been obtained pursuant to 6 Geo. 4, c. 16, s. 88. On referring to the proceedings in the Bankruptcy, it appeared that the proper consent had been obtained. The Defendant's Counsel then required that fact to be proved ; but the Plaintiffs' Counsel said that such proof was rendered unnecessary, by the 96th Section of the Act(a).

[*393] *The *Vice-Chancellor* held that it was necessary for the Plaintiffs to prove the Consent ; and, on their undertaking so to do, the Cause proceeded.

The Bankrupt having been examined as a Witness for the Defendants. in order to prove the validity of the delivery to them of the Bills of Exchange, the Plaintiff's Counsel objected to the admissibility of his Evidence, on the

(a) This Sect. is as follows: " And be it Enacted that, in all Commissions issued after this Act shall have taken effect, no Commission of Bankruptcy, Adjudication of Bankruptcy by the Commissioners, or Assignment of the Personal Estate of the Bankrupt, or Certificate of Conformity, shall be received as Evidence in any Court of Law or Equity, unless the same shall have been first so entered of record as aforesaid, and the Person so appointed to enter matters of record as aforesaid shall be entitled to receive, for such entry of every such Commission, Adjudication of Bankruptcy, Assignment or Order for vacating the same respectively, having the Certificate of such Entry indorsed thereon respectively, the Fee of 2s. each, and for the entry of every Certificate of Conformity, having the like Certificate indorsed thereon, 6s. ; and every such Instrument shall be so entered of record upon the application of, or on behalf of any Party interested therein, and on payment of the several Fees aforesaid, without any Petition in writing presented for that purpose ; and the *Lord Chancellor* may, upon Petition, direct any Depositions, Proceedings or other matter relating to Commissions of Bankruptcy to be entered of record as aforesaid, and also appoint such Fee and Reward for the Labour therein of the Person so appointed as aforesaid as the *Lord Chancellor* shall think reasonable, and all Persons shall be at liberty to search for any of the matters so entered of record as aforesaid: Provided that on the production in Evidence of any Instrument so directed to be entered of record, having the Certificate thereon, purporting to be signed by the Person so appointed to enter the same, or by his Deputy, the same shall, without any proof of such Signature be received as Evidence of such Instrument having been so entered of record as aforesaid."

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ground that it tended to take away Property from Creditors who could not sue him, and give it to Creditors who could sue him. The Defendants' Counsel contended that the Evidence of the Bankrupt ought to be received, because it tended to diminish his Estate.

The VICE-CHANCELLOR :

The Evidence of the Bankrupt, the tendency of which is to establish the validity of the delivery of the Bills,* by him, to the De- ['294]
fendants, is, in one respect, against himself, and, in another respect, in his own favor: for, by proving the validity of the Transaction, he will diminish the Amount of the Demand for which he, not having obtained his Certificate, may be sued by the Defendants; and, so far, the Evidence will be in his favor; but he will also diminish the amount of any Surplus that there may ultimately be of his Estate; and, so far, the Evidence will be against him. I think, therefore, that his Evidence ought to be admitted.

Mr. *Knight*, Mr. *G. Richards* and Mr. *Blunt*, appeared for the Plaintiffs, and Sir *E. Sugden*, Mr. *Pepys*, Mr. *Koe* and Mr. *Rolfe*, for the Defendants.

*COTTINGHAM v. LORD SHREWSBURY.

['395]

1832: 5th July.—Practice.—Defendant.—Decree —Mortgage.

If, in a Suit for Redemption against several successive Mortgagees, the first Mortgagee does not appear at the hearing, a subsequent Mortgagee will be allowed to make the Decree absolute against him.

THIS was a Bill filed by a Mortgagor, to redeem several successive Mortgagees. The first Mortgagee did not appear at the hearing, and a Decree *Nisi* was obtained against him. Messrs. *Praed*, *Mackworth* & *Fane* were subsequent Mortgagees; and the Decree, as is usual in like Cases, directed that an Account should be taken of what was due to them, as well as to the other Mortgagees, and that the Amount should be paid by the Plaintiff.

Mr. *Rolfe*, for the Defendants, *Praed*, *Mackworth* & *Fane*, now moved for leave to serve a Subpœna on the first Mortgagee, to show cause why the Decree *Nisi* obtained in this Cause should not be made absolute against him.

Motion granted.

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PAGE AND OTHERS v. TOWNSEND.

1832: 5th July.—*Copyright Prints.*

Prints engraved and struck off Abroad, but published here, are not protected from Piracy.

Pleading.—Plaintiffs.—Persons not having a common Interest in the subject of the Suit, cannot be joined as Co-plaintiffs.

THE Bill stated that, for a considerable time past, the Plaintiffs, *Theophile la Fuite & Adolphe Goubard*, had published, and still continued to publish, periodically, in *Paris*, for their mutual benefit, a Work entitled "*Le Follet Courier des Salons*," a part of which consisted of Prints or Engravings representing the Fashions of Dresses in *Paris*, and [*396] which work was also published, "in *London*, by the Plaintiffs, *James Page & Geo. Frederic Carden*, for their mutual benefit; and that such Prints and Engravings were, from time to time, made from original Designs and Plates, drawn and made, expressly for, and at the proper Costs and Charges of all the Plaintiffs: That *Page & Carden* had also, for a considerable time past, published, periodically, in *London*, for their mutual Benefit, a Work intituled "*The Lady's Magazine*," and into which were introduced, as a part thereof, the same Prints or Engravings as were published in the work called "*Le Follet Courier des Salons*," or such of them as *Page* and *Carden* thought fit to introduce: That the Plaintiffs were all jointly interested in the Plates or Designs from which the said Prints or Engravings were taken; and that, in order to preserve their several Copyrights in the Designs, Plates, and Engravings, *La Fuite & Goubard* had, from time to time, made the usual deposit, of Impressions taken from the Plates, in the proper offices in *Paris*, and had transmitted Copies or Impressions, from all of such Plates and Designs, to *Page & Carden*, who had, from time to time, made the usual Publication of such Prints, in order to secure their Copyright in *Great Britain*, and had also selected Impressions, from such of the Designs and Plates as they had thought fit, for another Work or Publication belonging to them, intituled, "*The Lady's Magazine*:" That although Impressions from the Designs and Plates were so first taken at *Paris*, the same were, nevertheless, not published until a day or two after, or on the same day on which the Prints from the same Designs and Plates were published in *London*, so as to render the publication of the same Prints and Engravings as nearly cotemporaneous in *Paris* and [*397] *London*, as circumstances would admit, but that the same were never published in *Paris* otherwise than cotemporaneously with, or after the publication of the same in *London*: That, in April, 1832, *La Fuite & Goubard* printed, from two Designs or Plates prepared for them

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expressly, two Prints or Engravings, marked with the letters E and D, each containing two Female Figures, and immediately transmitted Impressions of the said Designs from the said Plates to *Page & Carden* in *London*, who published the same there on the 13th of April 1832; and *La Fuite & Goubard* published the said Prints or Engravings, in *Paris*, on the 15th of April, and they, in the same month, also printed from a Design or Plate prepared for them expressly, a certain other Print or Engraving marked F, also containing two Female Figures, and also, immediately thereafter, transmitted Impressions of the said Design from the said Plate, to *Page & Carden* in *London*, who published the same there on the 20th of the same month, and *La Fuite & Goubard* published their said Prints or Engravings, in *Paris*, on the 22d of the same month: That, immediately upon the publishing the said Prints or Engravings at *Paris*, *La Fuite & Goubard* caused Copies thereof to be severally deposited in the proper offices at *Paris*, and did all other Acts that were necessary, according to the Laws of *France*, to secure to them the Copyright in the Designs or Plates and the Prints or Engravings taken therefrom; and that *Page & Carden* did also, upon the publishing the said Prints or Engravings in *London*, cause the same, or some of them to be duly entered at Stationer's Hall, and that *La Fuite & Goubard* prepared, or caused to be prepared for them all the several Designs and Plates, at a considerable Expense, and for their joint and mutual Benefit: That the Defendant did on the 1st day of [*398] May 1832, without the consent of the Plaintiffs, print and publish, in *London*, divers Prints or Engravings, either exactly similar to, or being close Imitations of the several Prints or Engravings so printed and published by the Plaintiffs, and either copied from, or closely imitating their said Prints or Engravings, and that he had derived considerable Profit from the sale thereof: that the Defendant, though he admitted that the Prints and Engravings published by him, were Copies or close Imitations of the Plaintiffs' Prints or Engravings, pretended that he copied or imitated the same from the Prints or Engravings published by *La Fuite & Goubard* at *Paris*, and that he was justified in so doing; whereas the Plaintiffs charged that, even if the Defendant did copy or imitate the Prints or Engravings so printed and published by him, from the Prints or Engravings published by *La Fuite & Goubard* at *Paris*, yet that he had no right so to do, for that the Plaintiffs were all jointly interested in the Designs and Plates from which such Prints or Engravings were taken; and that the Copyright therein was protected, equally, for the Benefit of all the Plaintiffs, and that, whether the Copies or Imitations made and published by the Defendant, were taken from the Prints or Engravings published in *Paris*, or in *England*, it was equally a fraud upon the Plaintiffs.

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The Bill prayed for an Account of the Profits of the Sale of the Prints and Engravings so copied or imitated from the Prints or Engravings of the Plaintiffs, which had been printed and published by the Defendant, and for an Injunction to restrain the Defendant from printing, engraving, [*399] publishing or selling any other *Copies of the Prints or Engravings pirated from the Plaintiffs.

The Defendants demurred, generally, to the Bill.

Mr. *L. Lowndes* in support of the Demurrer :

First : There is no joint interest in the *English* and *French* Plaintiffs. The Bill states that the Plaintiffs, *La Fuite & Goubard*, publish, in *Paris*, for their mutual Benefit, a Work intituled “ *La Follet Courrier des Salons* ;” and that the two other Plaintiffs, *Page & Carden*, publish, in *London*, a Work under the same Title, for their mutual Benefit ; but the Bill does not allege that the foreign Plaintiffs, have any interest in the Work published in *London*, or in the Publication of the Prints and Engravings there. *De-londre v. Shaw* (a). *The King of Spain v. Machado* (b).

Secondly : the Acts of Parliament by which the Property in Prints is secured to the Inventors and Engravers, are 8 Geo. 2, c. 13 ; 7 Geo. 3, c. 38 ; and 17 Geo. 3. c. 57 (c). These Acts were intended for the Pro-

(a) *Ante*, Vol. II. p. 237.

(b) 4 Russ. 225.

(c) The following Sections of the above Acts were referred to in the course of the Argument.

The 8 Geo. 2, c. 13, s. 1, after reciting that divers Persons had, by their own genius, industry, pains and expense, invented and engraved, or worked in *Mezzotinto* or *Chiaro oscuro*, sets of Historical and other Prints, in hopes to have reaped the sole benefit of their labours, and that Printsellers and other Persons had of late, without the consent of the Inventors, Designers and Proprietors of such Prints, frequently taken the liberty of copying, engraving and publishing, or causing to be copied, engraved and published, base Copies of such Works, Designs and Prints, to the very great prejudice and detriment of the Inventors, Designers and Proprietors thereof ; for remedy thereof, and for preventing such practices for the future, enacts that, from and after the 24th of June 1735, every Person who should invent and design, engrave, etch or work in *Mezzotinto* or *Chiaro oscuro*, or, from his own Works and Inventions should cause to be designed and engraved, etched or worked in *Mezzotinto* or *Chiaro oscuro*, any historical or other Print or Prints, should have the sole right and liberty of printing and reprinting the same for the term of 14 years, to commence from the day of the first publishing thereof, which shall be truly engraved with the Name of the Proprietor on each Plate, and printed on every such Print or Prints ; and that if any Printseller or other Person whatsoever, from and after the said 24th of June 1735, within the time limited by the Act, should engrave, etch or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched or copied and sold, in the whole or in part, by varying, adding to or diminishing from the main design, or should print, reprint or import for sale, or cause to be printed, reprinted or imported for sale, any such Print or Prints, or any parts thereof, without the consent of the Proprietor or Proprietors thereof first had and obtained in writing, signed by him or them respectively, in the presence of two or more credible witnesses, or knowing the same to be so printed or reprinted without the consent of the Proprietor or Proprietors, should publish, sell or expose to

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tection not of Foreign, but of *British* Interest, Ingenuity and Labour. They all relate to the same *Subject, and therefore must [*401]

sale, or otherwise, or in any other manner dispose of, or cause to be published, sold or exposed to sale, or otherwise or in any other manner disposed of, any such Print or Prints, without such consent first had and obtained as aforesaid, then such Offender or Offenders should forfeit the Plate or Plates on which such Print or Prints were or should be copied, and all and every Sheet or Sheets (being part of or whereon such Print or Prints were or should be so copied and printed) to the Proprietor or Proprietors of such original Print or Prints, who should forthwith destroy and damask the same; and further, that every such Offender or Offenders should forfeit 5s. for every Print which should be found in his, her or their custody, either printed or published and exposed to sale, or otherwise disposed of, contrary to the true intent and meaning of the Act, the one Moiety thereof to the King, and the other Moiety thereof to any Person or Persons that should sue for the same.

The 7 Geo. 3, c. 38, s. 1, after reciting the before-mentioned Act, and that it had been found ineffectual for the purposes thereby intended, enacts that from and after the 1st of January 1767, all and every Person and Persons who should invent or design, engrave, etch, or work in *Mezzotinto* or *Chiaro oscuro*, or, from his own work, design or invention, should cause or procure to be designed, engraved, etched or worked in *Mezzotinto* or *Chiaro oscuro*, any historical Print or Prints, or any Print or Prints of any Portrait, Conversation, Landscape or Architecture, Map, Chart or Plan, or any other Print or Prints whatsoever, should have the benefit and protection of the said Act, and this Act, under the restrictions and limitations thereafter mentioned.

Sect. 2 enacts that, from and after said 1st of January 1767, all and every Person and Persons who should engrave, etch or work in *Mezzotinto* or *Chiaro oscuro*, or cause to be engraved, etched or worked any Print, taken from any Picture, Drawing, Model, or Sculpture, either ancient or modern, should have the benefit and protection of the said Act and this Act, for the term hereinafter mentioned, in like manner, as if such Print had been graven or drawn from the original design of such Graver, Etcher or Draftsman, and if any Person should engrave, print and publish, or import for sale, any Copy of any such Print, contrary to the true intent and meaning of this and the said former Act, every such Person should be liable to the Penalties contained in the said Act.

The 7th Section enacts that the sole right and liberty of printing and reprinting intended to be secured and protected by the said former Act and this Act, should be extended, continued, and be vested in the respective Proprietors, for the space of 28 years, to commence from the day of the first publishing of any of the Works respectively thereinbefore and in the said former Act mentioned.

The 17 Geo. 3, c. 57, after reciting the two former Acts, and that the said Acts had not effectually answered the purposes for which they were intended, and that it was necessary, for the encouragement of Artists, and for securing to them the Property of and in their Works, and for the advancement and improvement of the aforesaid Arts, that such further provisions should be made as were thereafter contained; enacts that from and after the 24th of June 1777, if any Engraver, Etcher, Printseller or other Person, should within the time limited by the aforesaid Acts, or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked in *Mezzotinto* or *Chiaro oscuro*, or otherwise, or in any other manner copy in the whole, or in part, by varying, adding to, or diminishing from the main design, or should print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or should publish, sell or otherwise dispose of, or cause or procure to be published, sold or otherwise disposed of, any Copy or Copies of any historical Print or Prints, or any Print or Prints of any Portrait, Conversation, Landscape, or Architecture, Map, Chart or Plan, or any other Print or Prints whatsoever, which had been or should be, engraved, etched, drawn, or designed, in any part of Great Britain, without the express consent of the Proprietor

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be all construed together. It clearly appears by the 17 Geo. 3, [*402] c. 37, that the Legislature did not intend to Protect any Prints, except such as should be "Engraved, Etched, Drawn or [*403] "Designed in any part of *Great Britain*." Here, the Copper Plates are not sent to this Country, and the Impressions then struck off; but the Impressions are taken in *Paris*, and sent to this Country; so that no Labour or Ingenuity are bestowed in this Country. The Plaintiffs are merely Vendors of a Foreign Publication. The mere entering of a Foreign Work at Stationer's Hall, does not confer a Copyright in it; the Copyright in the Prints in question is in Foreigners: and the Statutes referred to, were not intended to Protect a Foreign Copyright. *Clementi v. Walker* (d).

[The *Vice-Chancellor* :—According to the Statements in this Bill, the Plaintiffs, *Page & Carden*, are not the original Inventors of the Prints.]

Mr. *Lowndes* :—The Second Section of 7 Geo. 3, c. 38, precludes me from taking that Objection.

Mr. *Knight* and Mr. *Girdlestone*, in support of the Bill :

Though all the Expense of engraving Prints has been incurred Abroad, yet, if the Inventor publishes them in this Country, he is entitled to the Protection of the Statutes. The Act of the 17 Geo. 3 extends the Provisions of the two former Acts, and gives a remedy by Action, to the Proprietors of Prints engraved in *Great Britain*; but it leaves the two former [*404] Acts in "full force. Our Case falls within those two Acts; and the only question is, whether a *British* Subject, being in Partnership with a Foreigner, is not entitled to the Protection of those Acts. The Case stated in this Bill, is a Case of Publication in *London*, before Publication in *Paris*. If the Publication takes place here first, it is immaterial where the Work was Composed. *Clementi. v. Walker* has nothing to do with the present question. There the Work was first published Abroad. *Delondre v. Shaw* was a Case of Misjoinder: this is a Case of Partnership.

The VICE-CHANCELLOR ;

The Act of the 8 Geo. 2, protected the Property in Prints, for 14 years, by Penalty. The Act of the 7 Geo. 3 extended the Protection given by the former Act, to other Works, and for the Period of 28 years. The Act of the 17 Geo. 3 gives a new Remedy, namely, by Action. (His *Honor* here

or Proprietors thereof, first had and obtained in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible Witnesses, then every such Proprietor or Proprietors should and might by and in a special Action upon the Case, to be brought against the Person or Persons so offending, recover such Damages as a Jury, on the Trial of such Action, or on the execution of a Writ of Inquiry thereon, should give or assess, together with double Costs of Suit.

(d) 2 Barn. & Cress. 861.

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read the Act.) The general Objects of all these Acts, was the same, namely, to protect the Artist; they must all be considered as being *in pari materiâ*. The question then is, whether the Words found in the 17 Geo. 3, are not to be supplied in the other Acts.

It is plain that the object of the Legislature was to protect those Works which were Designed, Engraved, Etched or Worked in *Great Britain*, and not those which were Designed, Engraved, Etched or Worked Abroad, and only published in *Great Britain*.

The Case of *Clementi v. Walker* is not in point with respect to the Law of this Case, but the reasoning of the Learned Judge is applicable to the present Case. *for though such Words were not found in [*405] the Act on which that Case was decided, as occur in the 17 Geo. 3, yet the Learned Judge considered that the weaker Words extended only to Works published in *Great Britain*; and, therefore, I am of opinion that this Demurrer must be allowed.

The Demurrer must also be allowed upon the other ground. There are here four Plaintiffs, and two of them only have an Interest in the subject-matter of the Suit; for the Publishers in *Paris* are not represented as having any Interest in the Works published in *Great Britain*.

PENFOLD v. NUNN.

1832: 24th July.—*Defendant*.—*Pleading*.—*Parties*.—*Pleading*.—*Demurrer*.—*Parties*.

In order to dispense with a Person being made a Defendant, it is not sufficient to allege that he absconded a year before the Bill was filed.

The Drawer of an Accommodation Bill is a necessary Party to a Suit, by the Acceptor against the Holder, to have the Bill delivered up to be cancelled.

A Demurrer admits the Allegations in the Bill as against the demurring Party only.

THE Bill, which was filed in June 1832, stated that, in 1829, the Plaintiff accepted, for the accommodation of *J. S. Penfold*, his Relation, several Bills of Exchange, drawn by him, which he assured the Plaintiff should be duly provided for and paid by him, when at maturity: that one of the Bills was dated 21st September 1829, for 300*l.*, payable three Months after Date, and which *J. S. Penfold* delivered to the Defendant, to be discounted by him: that it never was discounted by the Defendant, or by any other Person, nor was any valuable Consideration given for it to *Penfold*: that he, *having be- [*406] come embarrassed in his Circumstances, in June 1831, *absconded from the Country*, leaving the Bill in the Defendant's hands; and that the Defendant had, lately, commenced an Action on the Bill, against the Plaintiff. The

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Bill charged that the Bill of Exchange was, when due, in *Penfold's* hands, and was never presented, to the Plaintiff, for Payment, or discounted by the Defendant; and, as Evidence thereof, that, in a Bill-account, a copy of which was annexed to the Bill, sent by the Defendant, in May 1831, to *Penfold* or his Agent, no mention was made of the Bill, nor, at that time, had any Sum been paid or advanced, by them, in respect thereof: that Bills for the Balance of the Account, were given, by *Penfold's* Father, to the Defendant, and thereupon all the Bills mentioned in the Account, and which were all the Bills in respect of which any claim was made by the Defendant, were delivered up, to *Penfold's* Father, to be cancelled: that, although the Bill accepted by the Plaintiff, became due in December 1829, no Claim was made in respect thereof, until after one of the Bills accepted as last aforesaid, had been dishonoured: that the Defendant alleged that the Bill accepted by the Plaintiff, was held by him, as a collateral Security for any Claim he might eventually have against *Penfold*: that, if any such arrangement was made, it was without the knowledge of, and was not binding on the Plaintiff, and such Bill was retained by the Defendant, without any Consideration having been given for it, and such arrangement was made after the Bill had arrived at maturity: that a regular interchange of Bills and Acceptances took place before Sept. 1829, between *Penfold* and the Defendant, and various Bills drawn by the Defendant, were accepted by *Penfold*

for the accommodation of the Defendant: and so it would appear [*407] 'if the Defendant would set forth a particular Account of all the Bills, at any time since 1826, drawn by *Penfold* and accepted by the Defendant, and also of all Bills, at any time since the time aforesaid, drawn by the Defendant and accepted by *Penfold*, and also an account of all Bills, at any time since the time aforesaid, indorsed over by one of the said Parties to the other, and the Dates of each of such Bills, and the Sums for which the same were drawn and accepted respectively, and the Names and Residences of each of the Indorsees upon such Bills, and the times when each of such Bills was drawn, accepted, indorsed and paid: that, if the Accounts between *Penfold* and the Defendant were taken, a Balance would be found due, from the Defendant to *Penfold*: that it had been agreed between them, that, if the Plaintiff should succeed in his Action, a part of the Money recovered should be paid over by him to *Penfold*: that the whole proceeding was a collusion and design to defraud the Plaintiff, as nothing was due from *Penfold* to the Defendant, nor was any consideration paid for the Bill. The Bill prayed for a Discovery and an Injunction to restrain the Action, and that the Defendant might deliver up the Bill of Exchange to be cancelled.

The Defendant demurred because *Penfold* was not a Party to the Bill.

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Mr. Barber, in support of the Demurrer :

Where a Plaintiff seeks to have a Bill of Exchange delivered up to be cancelled, the Drawer is a necessary Party. To dispense with his being a Party, it must be charged that, *at the filing of the Bill*, he was resident out of the jurisdiction of the Court. This Bill states merely that *he absconded in June 1831, and not that he is now out of the [*408] jurisdiction.

Mr. Knight, in support of the Bill :

If the Drawer were within the jurisdiction, he would not be a necessary Party, *Davies v. Dodd (a)* ; *Macartney v. Graham (b)* ; *Hodgson v. Murray (c)*. It appears, by the allegations in the Bill, that *Penfold* has no Interest in the Bill of Exchange sought to be delivered up. But, independently of that, it is sufficiently alleged that he is out of the jurisdiction, as it is stated that he has absconded : and, if we prove that, at the hearing, the Plaintiff must show that he has returned to this Country.

The VICE-CHANCELLOR :

With respect to the Allegation that a Person is out of the jurisdiction, the way to prove it, is to ask the Witnesses whether the Party is, at the time, out of the jurisdiction. It is consistent with the Allegation that *Penfold* absconded in 1831, that he may be now in the Country : and, therefore, that Allegation is not sufficient to dispense with his being made a Party to the Bill.

With respect to the other Point : if the facts alleged against *Penfold*, should be proved at the hearing, the Plaintiff will be entitled to his Equity. But I cannot, on the Demurrer of another Defendant, take the facts to be true as against an absent Party. The Demurrer admits the facts as against the Demurring Party only.

Demurrer allowed, with liberty to amend.

1832: 22d Nov.—PENFOLD v. NUNN.—*Practice*.—*Production of Documents*.

The Court will not, on Motion by a Defendant, compel a Plaintiff to produce Documents in his possession, although the Defendant swears that an inspection of them is necessary to enable him to answer the Bill.

*THE Plaintiff having amended his Bill by making *J. S. Penfold* a Defendant, the Defendant *Nunn*, now moved that the Plaintiff might be ordered to produce, for his inspection, the Bill-account, a Copy of which was annexed to the Bill, and also the Bills of Exchange which *Nunn* delivered up when he furnished the Account ; and that further time might

(a) 4 Price, 176.

(b) *Ante*, Vol. II. p. 285.

(c) *Ibid*. 515.

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be allowed him for putting in his Answer. The Motion was supported by an Affidavit, in which *Nunn* deposed that he believed that all the before mentioned Documents were in the possession of the Plaintiff or his Solicitor, and that he could not put in his Answer without an inspection of them.

Mr. *Barber*, for the Defendant *Nunn*, said that the Bill contained several searching Interrogatories as to the Dates, Considerations, and other particulars of the Bills of Exchange; that the Account was annexed by way of Schedule to the Bill, and the Defendant was asked whether it was correct; that injustice was done to the Defendant, because he was deprived of the means of showing what was the Consideration for the Bill of Exchange on which the Action was brought, *Pickering v. Rigby (a)*; *The Princess of Wales v. Lord Liverpool (b)*.

The VICE-CHANCELLOR :

If the Defendant wanted to prove, in the Action which he has brought, the Consideration given for the Bill of Exchange which the Plaintiff now seeks to have delivered up, he ought to have filed a Bill, against the [*410] Plaintiff, for a discovery of the Documents which he asks to have produced. The Defendant now says that he cannot put in his Answer without an inspection of those Documents. He is, however, at liberty to call upon the Plaintiff to produce them; and, if the Plaintiff refuses, he cannot complain that the Answer is insufficient. If the Defendant requires them for the purposes of his Defence in this Suit, he ought to file a Cross Bill, against the Plaintiff, for a discovery of them.

I never understood the reasoning upon which the decision, in *The Princess of Wales v. Lord Liverpool*, proceeded, and I cannot accede to it.

Motion refused.

In re CHIPPING SODBURY SCHOOL.

1832: 27th July.—Practice.—Charity Petition Act.

Under the Charity Petition Act, where one Order has been made on Petition, a subsequent Order may be obtained on Motion.

A PETITION has been presented for regulating this Charity, under 52 Geo. 3, c. 101. An Order has been made, upon Petition, for the Payment of a Sum of Money to the Schoolmaster, and a *Motion* was now made for a

(a) 18 Ves. 484. See the Judgment.

(b) 1 Swanst. 114. See also *Jones v. Lewis*, 2 Sim. & Stu. 242, but See *Spragg v. Corner*, 2 Cox. 109.

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short Order to enforce its execution. The question was, whether the Order could be obtained by Motion, or whether a Petition was not necessary.

Mr. *Knight*, for the Motion, cited *In re Slewringe's Charity* (a).

Mr. *Pepys* *contrâ*.

The *Vice-Chancellor* considered that, as it had been decided that, under the Friendly Society Act (b), an Application might [*411] be made by Motion; so the Order sought to be obtained in this Case, might be made upon Motion also.

Motion granted.

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1832: 27th July.—*Will — Construction.*

Testator bequeathed certain Monies, &c. to his Wife, in Trust for her so long as she remained a Widow: and on her marrying again, he bequeathed to her one Third of all his Property not otherwise disposed of, and the remaining two Thirds to his Nieces. The Widow died unmarried. Held that she was entitled to the Money in the Stocks, for her widowhood only, and that, on her dying unmarried, the residue became undisposed of.

JOSIAH WALLIS made his Will, dated the 25th of April 1798, and which was, partly, as follows: "And after payment of my just Debts and Funeral Expenses, I give and bequeath to my kind and affectionate Wife, *Sarah*, in trust for her use as long as she remains a Widow, the Interest of all Monies I die possessed of in the Stocks, being, at this time, 1,600*l.* Three per Cent. Consols, 650*l.* Four per Cent. Annuities, and 22*l.* 10*s.* per Annum Long Annuities, with whatever Sums I may hereafter accumulate, together with my Freehold Estate at *Cookham*, and Household Furniture, Plate, and Linen therein: it is my Will that the Estate and Furniture at *Cookham* as aforesaid, should be at her own disposal at my death immediately. I give and bequeath her likewise for life, the Rents and Profits of my Estate in *Artichoke-Lane* and *Redmaid-lane*, *Wapping*, and, on her demise, the above Estates to my Nephew, *Joseph Wilson*. I bequeath her, likewise, all Monies due or to come due on Bond, and part of *East India Ship*, *Albion*, in trust for her so long as she remains a Widow, but, upon her marrying again, one Third of all my Property not otherwise disposed of, and the remaining two Thirds to be divided, equally, among my Nieces, *Elizabeth*, *Mary*, *Kitty* and *Abby Wilson*, or the Survivors of them, and, in default, to my Nephews: and I nominate and appoint M. John [*412] *Wilkinson* and my Brother *William Wilson*, Esq., Executors

(a) 3 Merr. 707.

(b) 10 Ves. 287.

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and Trustees to this my Will ; and, in case of the death of either, the Survivor to appoint another from among my Relations if possible. I bequeath to *John Wilkinson*, as an acknowledgment of our friendship, a Diamond Ring." The Testator made a Codicil, dated the 29th of Nov. 1799, which was as follows : " Codicil. In consideration of my Brother-in-law, *William Wilson* being settled so far from me, I nominate and appoint *John Wilkinson* as aforesaid, and *William Salter*, sen., and *Sarah Wallis*, my Widow, my Executors, and the two former, Trustees to this my Will." The Testator died, leaving his Wife, and his Nieces mentioned in his Will and his Nephews *Joseph Wilson* and *James Wilson*, his next of Kin. His Widow died without having married again ; and the Plaintiff was her Executor.

The Question in the Cause was, what Interest the Testator's Widow took in the Property bequeathed in Trust for her.

Mr. Boteler and Mr. Lewis for the Plaintiff, said that the Testator intended that, if his Widow did not marry again, the Property in question should become her's absolutely : that the duration of the Trust was limited, but that the duration of her Interest was not limited : that the Trust must continue until it appeared whether she did or did not marry again ; and, if she did not marry, that the Property was to be at her disposal ; but, if she did marry, she was to have one Third of his Property not otherwise disposed of :

that a gift of the interest of a Fund, without limitation, will pass [*413] the Capital : that the Testator had fully disposed of his *Estates in *Artichoke-lane* and *Wapping* ; and that he had also disposed of his other Property, in the event of his Widow marrying again : that as the Estate and Furniture at *Cookham* were to be at the Widow's disposal immediately on the Testator's death, so the other Property was to be at her disposal at a future period : that the Testator, when he meant to give his Wife a Life interest only, had used the words, " for life : " that, though he had appointed his Wife an Executrix, he had not appointed her one of the Trustees of his Will, because he intended her to take beneficially : that, if there was an Intestacy, the Widow was entitled to take beneficially, under the Codicil, as she was not named one of the Trustees. *Newland v. Shepard* (a) ; *Peat v. Powell* (b) ; *Hale v. Beck* (c) ; *Tomkins v. Tomkins* (d) ; *Amhurst v. Litton* (e) ; *Shuffield v. Lord Orrery* (f) ; *Williams v. Jones* (g).

Mr. Spence and Mr. Hall, for the Defendant *Salter*, and the Nieces of the Testator named in his Will, who were four of his next of Kin, gave up all claim on behalf of the Defendant *Salter*, as he was named a Trustee in

(a) 2 P. W. 194.

(b) Amb. 387 ; and 1 Eden. 479.

(c) 2 Eden. 229.

(d) 1 Burr. 234 ; and 9 East, 404, cited.

(e) 3 Atk. 285, cited.

(f) Ibid. 282.

(g) 10 Ves. 77.

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the Codicil ; but they contend that, under the Will, each of the Nieces became entitled, on the Widow's death, to a Moiety of two Thirds of the Testator's Residuary Estate : that the expression "upon her marrying again," ought to be construed, "upon her marrying again or dying:" that, if the Nieces did not take under the Will, they were entitled to Shares of the Testator's Estate as in case of Intestacy : and that, where [*414] one Executor is appointed a Trustee, they are all Trustees. *Elton v. Sheppard* (h) ; *Lukford v. Cheeke* (i) ; *Gordon v. Adolphus* (k) ; *Mence v. Mence* (l) ; *Dawson v. Clarke* (m).

Sir E. Sugden and Mr. Webster for *Joseph Wilson* and *James Wilson*, were stopped by the Court.

The VICE-CHANCELLOR :

This is a very plain Case. There are four Bequests in this Will. The first is : "I give and bequeath to my kind and affectionate Wife, *Sarah*, in Trust for her use, as long as she remains a Widow, the Interest of all Monies I did possessed of in the Stocks, with whatever Sums I may hereafter accumulate." It is plain that this is a Gift to her as long as she remained a Widow. Then the Testator says : "Together with my Freehold Estate at *Cookham*, Household Furniture, Plate and Linen therein. It is my will that the Estate and Furniture at *Cookham* as aforesaid, should be at her own disposal at my death, immediately." Under this Bequest she takes an absolute Interest. Then he says : "I give and bequeath her likewise for life, the Rents and Profits of my Estate in *Artichoke-lane* and *Redmaid lane*, *Wapping* ; and, on her demise, the above Estates to my Nephew *Joseph Wilson*." Then he says : "I bequeath her, likewise, all Monies due or to come due on Bond, and part of *East India Ship, Albion*, in Trust for her, so long as she remains a Widow, but, upon her *mar- [*415] rying again, I bequeath her one Third of all my Property not otherwise disposed of." It was contended that the words, "upon her marrying again," must be construed, "upon her marrying again or dying:" but it would be absurd to give her one Third of the Property, in the event of her death. In *Gordon v. Adolphus*, it was evident that the Testator meant that his Daughter should take his Estate in succession to his Widow, in all events, although he alluded only to his Widow marrying again. Here the Testator has given the Property to his Wife, for her Widowhood only, and, on her marrying again, he has given her one Third of his Property not otherwise disposed of. It is evident that, on the Wife dying unmarried, there was an Intestacy as to the Property firstly and fourthly given.

With respect to the claim made for the Widow as Executrix, here there

(h) 1 Bro. C. C. 502.

(i) 2 Lev. 125.

(k) 3 Bro. P. C. 306.

(l) 18 Ves. 248.

(m) Ibid. 247.

1832.—Lord Portarlington v. Graham.

is an attempt to dispose of the Residue, and therefore she could not be entitled to it in that character.

[*416]

*LORD PORTARLINGTON v. GRAHAM.

1832 : 16th June.—Practice.—Injunction.

The Court will not grant a special Injunction against the Assignees of a Bond, to restrain an Action brought by them in the Name of the Assignor.

THE Plaintiff was the Obligor, and the Defendant, *Graham*, was the Obligee in a Bond. *Graham* had assigned the Bond to the other Defendants, *Beddome* and *Simpson*, who brought an action on the Bond, against the Plaintiff, in *Graham's* name, and recovered Judgment. The Bill prayed for an Injunction to restrain *Graham* from proceeding in the Action, and to restrain the other Defendants from proceeding in the Action brought by them in his name, or from commencing any other Action in his Name on the Bond. None of the Answers had been put in, nor were any of the Defendants in contempt.

Mr. *Pepys* and Mr. *Bagshaw*, for the Plaintiff, now moved for a *special* Injunction against *Beddome* and *Simpson*, according to the prayer of the Bill.

Mr. *Knight*, for the Defendants, stated, as a preliminary objection to the Motion, that it was contrary to the established practice of the Court to move for a special Injunction to restrain proceedings at Law.

Mr. *Pepys* and Mr. *Bayshawe* said that *Graham* was the nominal Plaintiff at Law : but that *Beddom* and *Simpson* were, in reality, the Persons who were proceeding against the Plaintiff : That it was absurd that the Injunction should issue for want of the Answer of the nominal Plaintiff at Law, when, according to the decision in *Montague v. Hill* (a), his Answer could not be used for the purpose of dissolving the Injunction.

[*417] *THE VICE-CHANCELLOR :

According to my apprehension of Lord *Lyndhurst's* decision in *Montague v. Hill*, the common Injunction ought to have been obtained against *Beddome* and *Simpson*, as well as against *Graham*. This Case must have frequently occurred before : but I never recollect a similar application.

Mr. *Knight* and Mr. *Lloyd*, for the Defendants *Beddome* and *Simpson*, said that the common Injunction extended to the Party sought to be restrained, his Counsel and Agents : and that, in *Montague v. Hill*, the question was whether the Answer of the Assignor of a Bond could be read against the Assignee.

(a) 4 Russ. 128.

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Mr. *Pepys*, in reply :

The common Injunction is granted only against the Party who is Plaintiff at Law, and not against Persons who are suing in his name. It would restrain *Graham* until his Answer : but, if he were to admit the whole of the Case stated in the Bill, his Answer would, according to the decision in *Montague v. Hill*, go for nothing. *Graham* has nothing to do with the Action : why then should the Injunction be granted on his default. If he were to admit all the Equity in the Bill, according to *Montague v. Hill*, it would be no reason for continuing the Injunction.

The VICE-CHANCELLOR :

In *Montague v. Hill*, the course adopted was to issue the common Injunction against *Hill*. It appears to me that all that was decided in that Case, was that, where the common Injunction had issued against the Party in whose name the Action was brought, and he had put in his Answer, and the Assignees had put in theirs, their Answer was to [418] be read, and his to be disregarded. That affords no foundation for the proposition that a Plaintiff in Equity is entitled to move for a Special Injunction to restrain proceedings at Law, before the putting in of any Answer. I think that, if it were right to grant Special Injunctions, before Answer, against the Assignees of *Choses in Action*, applications for them would have been frequent. But I recollect no instance of such an Application : and no inference arises from *Montague v. Hill*, to induce me to enlarge the Jurisdiction of this Court as to Injunctions, which is sufficiently large already.

Motion refused.

1832: 5th July.—*Practice.*

The Assignee of a Bond brought an Action on the Bond, in the Name of the Oblige. The Obligor filed a Bill against the Oblige and the Assignee, to restrain the Action. The former being abroad, the Court made the usual Order for Service of the Subpœna, on the Attorney in the Action.

Graham being abroad, Mr. *Pepys* and Mr. *Bagshawe*, for the Plaintiff, now moved that service of the Subpœna to appear to and answer the Bill, on *Beddome*, the Attorney in the Action, might be deemed good service on *Graham*.

Mr. *Knight* and Mr. *Lloyd* *contra*, said that *Graham* was merely the nominal Plaintiff at Law : that *Beddome* was not, in reality, his Attorney : that, as *Beddome* and *Simpson*, the real Plaintiffs at Law, were not in default, no Injunction could be granted on the default of *Graham*, the nominal Plaintiff, and, therefore, the Order, if granted, would be useless.

The VICE-CHANCELLOR :

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If *Beddome* and *Simpson* think proper to bring an Action in the name of *Graham*, *Graham* must be dealt with as if the Action had been brought by him, in his own right.

Motion granted.

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*GREENWOOD v. ATKINSON.

1832: 3d July.—*Supplemental Bill.—Pleading.—Parties.*

Defendant, in his Answer, insisted that he was entitled to be reimbursed by *A.* what he might be decreed to pay to the Plaintiff, and, therefore, that *A.* was a necessary Party; and accordingly, the Court, at the hearing, ordered the Cause to stand over, with liberty to amend. Plaintiff did not amend, but filed a Supplemental Bill, against *A.* alone, praying the same relief as in the original Bill. The two Causes were heard together, when it was objected that the Plaintiff ought to have amended the original Bill, or made the original Defendant a Defendant to the Supplemental Bill. But the objection was over-ruled.

A MOTION made, by the Defendant *Atkinson*, for leave to put in a Supplemental Answer to the Bill, is reported, *Ante*, Vol. IV. p. 54. In addition to what is there stated, it is necessary to mention that the Trusts of the Settlement were to pay, during the Life of *William T. Lee*, the Interest and Dividends of the Trust-monies, to him, or such Person or Persons as he should appoint, and, after his decease, in case *Maria Susanna*, his Wife, should survive him, to pay such Interest and Dividends to her, for her life, and, after her decease, to stand possessed of the Capital, for *Lee*, his Executors, Administrators, and Assigns. The Prayer of the Bill was that the Defendant might be ordered to pay, to the Plaintiff, what should appear to be due to him, for the Principal and Interest of the 1,000*l.*, or that an Issue, or some other proceeding at Law might be directed to ascertain what Damage the Plaintiff had sustained by the gross negligence of *Bolland* and the Defendant, and that the Defendant might be decreed to pay, to the Plaintiff, what should be found due for such Damage, the Plaintiff being ready, upon such Payment, to deliver, to the Defendant, the Indenture of the 31st of December 1814, and the Bond of even date therewith.

The Defendant, in his Answer, said that the Commission of [*420] Bankrupt against *W. T. Lee*, was still in force, and *that *William Garlick* was the sole Assignee of his Estate, and he insisted that he was not personally liable to make good the 1,000*l.*, to the Plaintiff, or any Interest in respect of the same: but, if the Court should hold that he was so liable, then that he was entitled, to the extent of the Interest that *Lee* took under the Settlement, in the 1,000*l.* and Interest, to be reim-

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bursed what he should be decreed to pay in respect of the matters in question in the Cause; and that the Bill ought to have been framed, and *Lee's* Assignee, and *Maria Susanna*, his Wife, ought to have been made Parties to the Bill, so that the Court might, at once, make such a complete and perfect Decree as the justice of the Case required, and to the end that the 1,000*l.*, if the Court should be of opinion that the Defendant was liable to make good the same, might be properly secured upon the Trusts of the Settlement, and directions given for reimbursing the Defendant, out of *Lee's* Estate and Interest under the Settlement in the 1,000*l.* and the Interest thereof, what the Defendant should be decreed to pay in respect of the matters in question in the Cause.

The Cause having come on to be heard, the Objection, raised by the Answer, for want of Parties, was stated; and The *Vice-Chancellor*, being of opinion that it was well founded, ordered that the Cause should stand over, with liberty, to the Plaintiff to amend his Bill, by adding Parties.

The Plaintiff did not amend, but filed a Bill against Mrs. *Lee* and *Garlick*, (without making *Atkinson* a Party) praying that that Bill might be taken as a Bill of Supplement to the original Bill, and that the Plaintiff *might have the same Relief as he had prayed by his [*421] original Bill.

The original and Supplemental Suits now came on to be heard.

Mr. *Knight*, Mr. *Brandreth*, and Mr. *G. Richards*, for the Plaintiff.

Sir *E. Sugden*, Mr *Barber*, and Mr. *R. Atkinson*, for the Defendant *Atkinson* :

We take the same objection for want of Parties, as we did when the Cause first came on to be heard. Your *Honour* ordered the Cause to stand over, with liberty to amend by adding Parties, but no amended Bill has been filed. The plaintiff has filed a Supplemental Bill against *Garlick* and Mrs. *Lee* only. A Decree must be made in this Case, which will affect the Rights of those Persons and of *Atkinson*; but he is not a Party to the Supplemental Bill. No Decree can be made for inquiries between Defendants who are not Parties to the same Record. There is an unimpeached Order to amend; and no leave has been given to file a Supplemental Bill. When the end proposed can be obtained by Amendment, no Supplemental Bill can be filed. The Cause cannot proceed without *Atkinson* being a Party to the Supplemental Suits; for the Court cannot give him that Relief to which he is entitled as against the Parties to the Supplemental Bill. We have no Briefs in the Supplemental Suits, and know nothing of it. Where Persons take derivatively from, or by way of substitution for the Parties to the original Bill, they are properly brought before the Court by Supplemental Bill. But, here, the Parties to the Supplemental Bill, *ought to have been made Parties to the [*422]

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original Bill. At all events, *Atkinson* ought to have been made a Co-defendant to the Supplemental Bill. For, where the Parties to a Supplemental Bill, have to contest the question raised by the original Bill, with the Defendant to that Bill, they ought all to be made Parties to the same Record. If there had been any Evidence in the Supplemental Suit, it could not affect *Atkinson*, who is a Defendant to the original Suit only.

Mr. *Rogers* appeared for the Defendants *Garlick* and Mrs. *Lee*.

The VICE-CHANCELLOR :

I do not consider it to be a breach of the Order to amend, that the Plaintiff has brought the defective Parties before the Court, by Supplemental Bill, instead of availing himself of the Order to amend for that purpose. It is no objection to the course of proceeding adopted by the Plaintiff, that he has not made *Atkinson* a Party to the Supplemental Bill ; because it is filed for the purpose of being heard with the original Bill, and of obtaining, for the Plaintiff, the same Relief as is prayed by the original Bill. Nothing is more usual than to file a Supplemental Bill, for the purpose of bringing a new Party before the Court. Where a Supplemental Bill is filed for the purpose of putting in issue a new fact, or an old fact newly discovered, it is right to make the original Defendants Parties to it. But where the Case consists of Facts, which existed prior to the filing of the original Bill, according to my apprehension, the defective Party is to be brought before the Court, by Supplemental Bill alone.

*One Decree will be made in both these Causes ; and the
 [*423] Court will give Mr. *Atkinson* that Relief to which he is entitled, in the Supplemental Suit.

The Objection having been over-ruled, the Cause was heard. The Decree directed the Bill to be retained for a Twelvemonth, the Plaintiff to be at liberty to bring such Action, against *Atkinson*, as he should be advised, in which Action *Atkinson* was not to set up the Objection that *Bolland* was a Partner with him as an Attorney ; and the Action was to be considered as having been commenced on the 10th of June 1830 (a).

(a) The Bill was filed on that day. *Atkinson*, in his Answer, insisted on the Statute of Limitations as a bar to the Plaintiff's demand.

The Action was tried at the *Yorkshire Spring Assizes* 1833, when the Plaintiff was nonsuited ; but leave was given to him to move to set aside the Nonsuit, on certain legal grounds. Upon the Motion being made, a special Case was directed to be framed ; but before it could be argued, the Defendant died ; and the Action, being for a Tort, terminated.

1832.—Biggs v. Andrews.

*BIGGS v. ANDREWS.

[*424]

1832: 14th July.—*Conversation.*

A. after reciting that he was desirous that his Real Estates should be sold, conveyed them to Trustees, in Trust to sell or mortgage the same, and to stand possessed of the Money to be raised, in Trust for him, his Executors, &c. By Deed of even Date, he assigned all his Personal Property, to the same Trustees, in Trust for himself, his Executors, &c. By a third Deed, of even date, after reciting that he was indebted to various Persons, and was desirous that his affairs should be wound up, and his Real and Personal Property converted into Money, and his debts paid, and that the Conveyance and Assignments were made to enable his Trustees, in the first place, to pay his debts; he declared that the Trustees should stand possessed of the Money to arise from the sale or mortgage of his Real and Personal Property, in Trust to pay his Debts, and then in Trust for him, his Executors, &c. The Trustees sold part of the Real Estates, and the proceeds were more than sufficient to pay A.'s Debts. Shortly afterwards A. died intestate. Held that the unsold Estates were to be considered as Personalty.

By Indentures of the 22d and 23d of August 1827, made between *Richard Biggs*, of *Bury St. Edmunds*, Grocer, of the one part, and the Defendants, *Biggs Andrews*, and *John Orbell*, of the other part, after reciting that *Richard Biggs* was desirous that the Freehold and Copyhold Hereditaments therein described, *should be sold*, and that he had requested *Andrews* and *Orbell* to act as Trustees for him in the Sale thereof, *Biggs* conveyed a Messuage in *Bury*, in which he carried on his Business, and certain other Freehold Hereditaments, to *Andrews* and *Orbell* in Fee: and he covenanted, with the Trustees, to surrender to them, in Fee, the Copyhold Hereditaments therein described: And it was declared that they should stand possessed of the Freehold and Copyhold Premises thereby released and covenanted to be surrendered, upon Trust, as soon as conveniently might be after the execution of the Deed, of their own proper authority, and without the concurrence of, or any other power or authority from *Biggs*, his Heirs, Executors or Administrators, to sell and dispose of, and grant, release, and assure, *either absolutely or by way of Mortgage*, and either together or in parcels, and by public or private Sale, or in such other way or manner as they should think fit, all or any part of the same Hereditaments, for such Sums of Money as they should deem reasonable, and to sign effectual Receipts and Discharges for the Purchase-money to be paid for the same; and it was declared that the Trustees should stand possessed of all the Sums of Money to arise or be produced by any Sale, *Mortgage*, or other disposition which should be made of the Hereditaments, and of the Rents, Issues and Profits thereof in the meantime, upon Trust, in the first place, to retain the Expenses incident to the Sale or other disposition of his Real Estate, and after payment thereof, in Trust for *Biggs*, his Executors, Administrators or Assigns. By an Indenture of the

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23d of August 1827, *Biggs* assigned all his Stock in Trade, Goods, Debts and other Personal Property, to the same Trustees, upon Trust, as to the Monies to be produced thereby, after payment of the Expenses attending the same, for *Biggs*, his Executors, Administrators and Assigns. By another Indenture of the same date, after reciting that *Biggs* was indebted to his Sisters therein named, and to various other Persons, and that he was desirous that his Affairs should be wound up, and his *Real and Personal Property converted into Money*, and the debts due to him gotten in, and the debts due from him paid, with as little delay as possible, and that the Conveyance and Assignment before mentioned were made to enable the Defendants, in the first place, to pay his debts out of the produce of his Real and Personal Estate: It was witnessed that the Defendants should stand possessed of the Sums of Money which should be received from any Sale,

Mortgage or other disposition of the said Freehold Estates and [*426] Personal Property, and from the *receipt and collection of his debts, in Trust, to apply the same in payment of the debts owing by him, and, after payment thereof, in Trust for him, his Executors, Administrators and Assigns. The Defendants sold all the Hereditaments except the House in *Bury*; and, out of the proceeds and the other Monies which came to their hands in the execution of their Trust, they paid all *Biggs's* debts; and, there then remained in their hands a balance of 283*l.* due to *Biggs*. The Trustees advertised the House in *Bury* to be sold, together with *Biggs's* Stock in Trade, (that being the most advantageous mode of disposing of it): but without success. They afterwards sold the Stock in Trade to *G. Oliver*, and offered to sell him the house also; but he declined the offer, declaring that he was not in a situation to purchase both. They therefore, without consulting *Biggs*, granted *Oliver* a Lease of the House, for 14 Years, at the yearly rent of 70*l.* In February 1829, a draft of a Release was prepared for *Biggs* to execute to the Defendants, by which their Trust would have been declared to be at an end; but *Biggs* died, Intestate, in April 1829, before the Release was ingrossed for Execution.

The Bill was filed by his Brother and Heir at Law, against the Trustees, and his Sisters who had taken out Administration to him, charging that the purpose for which *Biggs* had directed his Freehold Estates to be sold, was for the payment of his debts, which were all satisfied without there being occasion to sell the House in *Bury*; and that, if he had lived, he would have required it to be re-conveyed to him.

The Bill prayed that it might be declared that the Trusts of [*427] the Deeds were at an end, and that the Trustees *might be decreed to convey the House to the Plaintiff, in Fee, free from Incumbrances, except the Lease to *Oliver*.

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The Trustees, in their Answer, said that they granted the Lease, in exercise of their discretion as Trustees, for the general Benefit of the Estate, without consulting *Biggs*, and that when he was made acquainted with it he did not approve of it, but made no objection thereto, and that he, in general, approved of their Conduct: that after the Execution of the Lease, they, from time to time, treated with *Oliver* for the Sale of the House to him, but were unable to obtain what they considered a fair Price for it; that the Payment of *Biggs's* Debts, was not the only purpose to be effected by the Deeds, his object being to retire from Business, on account of ill health, and to have his Affairs managed for him.

The Answer of the other Defendants was to the same effect. They insisted that the effect of the Conveyance to the Trustees was to convert the House into Personal Estate, absolutely, as between his Legal and Personal Representatives; and they claimed to have the House sold, and the proceeds paid to them.

William Kitchener, the Solicitor who prepared the Deeds, was examined as a Witness for the Personal Representatives. He deposed that, at and for some time before the Execution of the Deeds, *Biggs* was in such a state of health as to render it desirable that he should be free from the cares and anxieties attending the Management of Property; and that his object in executing the Deeds, was to dispose of all his Property *to pay his Debts, settle his Affairs generally, and relinquish [*428] Business, so that he might afterwards live upon the Income of the Surplus of his Property.

Sir *E. Sugden* and Mr. *Parker*, for the Plaintiff:

It appears, from the language of the Deeds, that the Intestate did not intend to convert his Real Estate, out and out into Personalty, but to leave it to the discretion of his Trustees, whether they would raise Money sufficient for the payment of his Debts, by Sale or by Mortgage of his Real Estates. The Trustees sold what was necessary for that purpose, and they had a Balance in hand. They had no authority to grant the Lease to *Oliver*. That act was inconsistent with their Trust. Before the Testator died, the object of the Trust was satisfied. If the Intestate's Real Estate was converted into Personalty, there was an end of the character impressed upon it, as soon as the Draft of the Release of 1829 was prepared. He would have executed the Release, if he had not died before it was engrossed. The Trustees caused the Release to be prepared, because they knew that it was the Intestate's intention to take back the Estate. They do not say that he did not approve of the Release. The Draft must be taken as declaring the intention of the Parties at the time when it was prepared. Any act that amounts to a declaration of the Party that he elects to take the

1832.—*Biggs v. Andrews.*

Property as Real Estate, is sufficient to restore it to its original state. The Trust was satisfied, and the Trustees had retired from it. Unless the Estate was in the Trustees for the purpose of conversion, there was an end of its character as Personal Estate, *Van v. Barnett* (a), *Shard v. Shard* (b), *Wright v. Rose* (c).

[*431] **[The Vice-Chancellor :—It does not appear that Biggs directed the Release to be prepared, but that it was prepared, by the Trustees, for him to execute.]*

Mr. *Knight* and Mr. *Rolfe*, for the Defendants, the Personal Representatives of *Richard Biggs*, said that it clearly appeared, from the Recitals in the Deeds, that it was the Intestate's intention to wind up his Affairs, and convert his Real Estate into Money: that the Trustees granted the Lease to *Oliver*, merely for the purpose of rendering the Stock in Trade more saleable: That it appeared, by the Evidence, that the Trustees, after granting the Lease, treated, from time to time, for the sale of the Premises: That, with regard to the Draft of the Release, it did not appear that the Intestate was privy to it: That, in *Stead v. Newdigate* (d), Sir *William Grant*, M. R. says: "From the moment when the Court determines that this was turned into Personality, the *onus* lies on the Defendant to show, with reasonable clearness, that the Testator meant to pass it under a different denomination. It is not enough to fix upon an ambiguous expression or an equivalent direction." *Ashby v. Palmer* (e). *Shard v. Shard* was a Case in which Money was to be laid out in Land, under a Parliamentary Trust.

The VICE-CHANCELLOR:

One cannot but observe that the Release in Fee is negligently prepared. It first recites that *Biggs* was desirous that his Real Estates should be sold, and that he had requested *Andrews* and *Orbell* to act as Trustees for him in the Sale. The Estates are then conveyed to the Trustees, in trust to sell and dispose of the same, either absolutely or by way of Mortgage; and then their Receipts are declared to be sufficient discharges for the Purchase-money, taking no notice of the Money that might be raised by Mortgage; and it is then declared that the Trustees shall stand possessed of the Monies to arise from any Sale, Mortgage, or other disposition of the Estates, upon Trust to retain the Expenses of the Sale or other disposition thereof, and then in Trust for *Biggs*, his Executors, Administrators and Assigns.

It strikes me that the intention of the Grantor to be collected from all the Deeds taken together, was to create a Trust for Sale, and therefore,

(a) 19 Ves. 102.

(d) 2 Mer. 521.

(b) 14 Ves. 348.

(e) 1 Mer. 296.

(c) 2 Sim. & Stu. 323.

1832.—*Watson v. Reed.*

that there was a conversion of his Real Estates, out and out, into Personalty. The question then is, whether there has been such an act done, by *Biggs*, as amounts to a manifestation of intention that the Property should be reduced to its original state. It does not appear how far the Preparation and Contents of the Release of 1829, came to his knowledge; and it is right to have that matter further inquired into, as there may have been such an exercise of mind by him, as amounted to a manifestation of his intention to have the Property reduced to its original state.

Refer it to the *Master* to inquire and state whether *Biggs* knew of the Preparation of the Draft Release, and to state what were its Contents, and all Special Circumstances relating to it.*

**WATSON v. REED.*

[*431]

1832: 21st July.—*Will.—Construction.—Legacy.*

Testator gave 6,000*l.* to each of his Daughters then or thereafter to be born, payable at 21 or Marriage, and directed that the Portions of such of them as should die before they were payable, should sink, into the residue: and after devising his Real Estates to his Sons and Daughters in strict Settlement, he bequeathed the Residue of his Personal Estate to Trustees, in Trust for such of his Children as should first be entitled to his Real Estates. By a Codicil, the Testator gave to each of his Daughters living at his Decease, 1,000*l.* in addition to the 6,000*l.*, mentioned in his Will, for the same Uses, &c. as were mentioned therein. By a second Codicil, which commenced and concluded with the same words as the first, but did not refer to it, the Testator gave, to each of his two Daughters, 2,000*l.* in addition to the 6,000*l.* mentioned in his Will, and directed that the Portions of his Children who should die before they became payable, should not fall into the Residue, but go to his Heir. The Testator left two Daughters. Held that the Legacies given to them by the Codicils, were cumulative.

WILLIAM WATSON, Esquire, by his Will dated the 24th November 1818, gave the Portions following to each and every of his Children, whether born before or after his Decease, except *William Watson*, his then only Son, and such other of his Children as might become entitled to the Possession or Rents and Profits of his Real Estates, under the Conditions hereinafter mentioned; (that is to say), the sum of 1,200*l.* to each of his Sons, payable on their attaining 21, the sum of 6,000*l.* to each of his Daughters, payable at 21 or Marriage; and he directed that the said Legacies to his Children should be applied for their Maintenance and Education, at the discretion of their Guardians therein appointed, the Surplus, if any, to be added to their

* This Cause was originally heard in January 1832. The above is a Report of the Re-hearing. Both the Decisions were substantially the same, except that the first did not direct any Inquiries as to the Release.

1832.—Watson v. Reed.

respective Portions ; but that the Portions of each of them who should die before they became payable, should fall into the residue of his Personal Estate. And, after devising his Real Estates to his Sons and Daughters, successively, in strict Settlement, the Testator gave the Residue of his Personal Estate to *C. D. Purvis* and *S. Reed*, in Trust to pay the same [*432] to such of his Sons or Daughters as *should first be entitled to the Possession, or to the Rents and Profits of his Estates, by virtue of the Limitations contained in his Will.

The Testator, made a Codicil to his Will, dated the 17th of May 1824, in the following words : “ Whereas I, *William Watson* of *North Seaton*, in the County of *Northumberland*, have duly made and published my last Will in writing, consisting of 17 sheets of paper, bearing date the 24th day of November 1818, since which time I have purchased several, various Real Estates, now I make and declare this to be a Codicil to my said Will ; and I hereby devise the said Real Estates which I have purchased since the time of making my said Will, precisely in the same manner, and to and for the same Uses, Trusts, Intents and Purposes, and under and subject to the same Powers, Provisoes and Declarations as are mentioned, expressed and declared, in and by my said Will, of and concerning the Real Estates which belonged to me at the time of making such Will : and I also hereby give and bequeath, unto each of my Daughters that shall be living at the time of my Decease, the sum of 1,000*l.* in addition to the 6,000*l.* mentioned in my aforesaid Will, for the same Uses, Trusts, Intents and Purposes, and subject to the same Powers, Provisoes and Declarations as are mentioned in my aforesaid Will. And whereas *C. D. Purvis* named in my said Will as one of my Trustees and Executors, has departed this Life since my said Will was made, now I hereby nominate, constitute and appoint *Thomas Purvis*, of *Lincoln's-Inn*, in the County of *Middlesex*, Esquire, eldest Son of the said *C. D. Purvis*, a Trustee and Executor of my said Will and of this my Codicil thereto, to act jointly with my other Trustees and Ex- [*433] ecutors named in my said Will, *precisely in the same way, and with the same Powers and Authorities as if the said *Thomas Purvis* had been made a Trustee and Executor in and by my said Will.”

The Testator made another Codicil, which was in his own Handwriting, but was neither dated, signed nor attested. From the commencement, down to and including the disposition of the Estates purchased since the date of the Will, it was expressed precisely in the same words as the former Codicil. It then proceeded thus : “ And I also hereby give and bequeath, unto my Son, *Y. T. Watson*, the sum of 4,000*l.*, in addition to the 12,000*l.* mentioned in my said Will : and I also give and bequeath, unto each of my two Daughters, the sum 2,000*l.*, in addition to the sum of 6,000*l.* mentioned in

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my said Will. And whereas it is mentioned, in my said Will, that the Portions of each and every one of my Children, who may die before they become payable, shall fall into and become part of the Residue of my Personal Property, now I hereby declare this Clause to be void and of none effect; and my Will is that such Portions of my younger Children as aforesaid, shall not fall into nor become part of the Residue of my Personal Property, but shall go to my Heir, for the same Uses, Intents and Purposes as are mentioned in my said Will of and concerning the Real Estates which belonged to me at the time of making such Will." The Codicil then recited the death of *C. D. Purvis*, and appointed his Son a Trustee and Executor of the Will and that Codicil, in precisely the same terms as the former Codicil.

The Bill was filed by *Y. T. Watson*, who was born after the date of the Will, and his Sisters *Diana* and **Dorothy Watson*, all [*434] of whom were Infants, against *W. Reed* and *T. Purvis*, the Trustees and Executors, and *William Watson*, the Testator's Heir, praying to have the Will and Codicil established, and the Trusts of them performed, and that the amount of the Legacies to which the Plaintiffs were respectively entitled, might be ascertained, and secured for their use, until they should become entitled to receive the same.

The *Master*, in his Report made in pursuance of the Decree, had considered the Plaintiffs, *Dorothy* and *Diana*, as being each entitled to Legacies of 6,000*l.*, 1,000*l.* and 2,000*l.*, and had computed Interest thereon accordingly. The Defendant *William Watson*, excepted to the Report, insisting that the *Master* ought to have certified that Interest was due, to each of them, on the Legacies of 6,000*l.* and 2,000*l.* only.

Mr. Agar and *Mr. Parker*, for the Defendant *William Watson*, in support of the Exceptions, said that the Codicils afforded internal evidence that the Testator intended the Legacies thereby given to his Daughters, to be substitutional and not cumulative, for the Testator had commenced and concluded both those Instruments in the same words; and had, by the second Codicil, given the sums of 2,000*l.*, in addition to the 6,000*l.* given by the Will, and not in addition to the 1,000*l.* given by the first Codicil, *The Duke of St. Albans v. Beauclerk* (a), *Hooley v. Hatton* (b), *Moggridge v. Thackwell* (c), *Allen v. Callow* (d), *Barclay v. Wainwright* (e), *Osborne v. The Duke of Leeds* (f), *Benyon v. Benyon* (g).

**Mr. K. Parker* and *Mr. Bagshawe* appeared for other Parties [*435] in the Cause.

(a) 2 Atk. 636.

(b) 1 Bro. C. C. 390, note.

(c) 1 Ves. jun. 464.

(d) 3 Ves. 289.

(e) Ibid. 462.

(f) 5 Ves. 369.

(g) 17 Vez. 24.

 1832.—Miles v. Dyer.

The VICE-CHANCELLOR :

If the Testator had had a third Daughter, she would have taken 1,000*l.* under the first Codicil. The Legacies given by the two Codicils, are given over to different persons. By the first Codicil, if a Daughter died before 21 or Marriage, her Legacy was to fall into the Residue: by the second, it was to go to the Heir. Therefore, these Legacies are not substitutional, but cumulative.

Exceptions overruled.

MILES v. DYER.

1832: 24th July.—Will.—Construction.—“*Or*” construed “*and*.”

Testator bequeathed his Real and Personal Estate to Trustees, in Trust to pay an Annuity to his Wife, and to raise and pay, to each of his Children, 2,000*l.* on their attaining 21, and to accumulate the Surplus Income of the Trust Property, during the Life of his Wife, and, after her Death, to sell the Property, and divide the Proceeds amongst his Children on their attaining 21; and in case all his Children should die in the Life time of his Wife, *or* under 21 and without leaving Issue, then, after his Wife's Death, to sell the Trust Property and divide the Proceeds amongst certain other Persons. Held that *or*, ought to be read as *and*, and that the Children, having attained 21, were absolutely entitled to the Property, though their Mother was living.

RICHARD MILES, Esquire, by his Will, dated the 7th of February 1812, after giving certain pecuniary and specific Legacies, gave all the Rest and Residue of his Estate and Effects, both Real and Personal, unto and to the use of the Defendants *John Dyer* and *John Miles*, their Heirs, Executors, Administrators, and Assigns, in Trust to collect and get in all such Debts and Sums of Money as should be outstanding and due to him at [*436] his Decease, and, from time to time, to invest the Money *so to be received, in their Names, in the usual Securities; and, out of the Rents and Profits of his Real and Leasehold Estates, and the Dividends, Interest and Annual Produce of the said Monies, Stocks, Funds and Securities, to pay to his Wife, the Plaintiff *Elizabeth Miles*, for her Life, an Annuity of 400*l.* for her separate use. The Will then proceeded as follows: “And I direct my said Trustees to appropriate such sum and sums of Money as, in their discretion, shall, from time to time, be necessary for the Support, Education, Maintenance and placing out of all such Children as I may leave surviving me, or who shall be born in due time afterwards, until they shall respectively attain the age of 21 Years, and, when and as my said Children shall respectively attain the age of 21 Years, upon Trust that they my said Trustees, and the Survivors and Survivor of them, his Executors and

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Administrators, do and shall, by and out of the sale of Stock in the Public Funds, or by sale of such part of my Freehold and Leasehold Estates as they shall think necessary, raise and pay the sum of 2,000*l.* of lawful Money of *Great Britain*, unto each and every such Child or Children, being a Son or Sons, as he or they shall so attain the said age, to and for his and their own use and benefit; and as to all and every such Child or Children, being a Daughter or Daughters and attaining the said age, upon trust to appropriate and set apart the sum of 2,000*l.* to each of my said Daughters, and to stand and be possessed thereof, and, from time to time, to pay the Dividends, Interest, and Annual Proceeds arising therefrom, into the proper hands of each and every of my said Daughter or Daughters, for and during the term of her and their respective natural Life or Lives, and the Receipt alone of all such of my said Daughter or Daughters shall, from time to time, whether covert or not, be good and sufficient Dis- [*437] charge and Discharges to my said Trustees and the Survivors and Survivor of them, his Executors and Administrators, for the same, and such several Payments shall be independent of and not subject to the Debts, Control, or Engagements of any Husband or Husbands she or they may at any time or times hereafter have; and, subject to the several Payments before mentioned, in Trust to lay out the Surplus Rents, Dividends and Interest (if any) in the Public Funds, in aid of such Capital, for and during the Life of my said Wife, and, from and after the Decease of my said Wife, in Trust that they my said Trustees, or the Survivor or Survivors of them, his Executors, Administrators or Assigns, do forthwith sell and dispose of all and every my said Freehold and Leasehold Estates, by Public Auction, and the Money arising therefrom, together with the Money in the Public Funds, and all other my Estate and Effects whatsoever (subject to the before-mentioned bequest to my said Daughters) and to pay and divide the same unto and amongst all my said Children, whether Sons or Daughters, *on their attaining the said age of 21 Years*, if more than one, in equal Shares and Proportions, share and share alike, but, if but one such Child shall live to attain the said age, then in Trust for such one Child, his or her Executors, Administrators, and Assigns absolutely. And, as concerning the Principal set apart to answer the said Legacies of 2,000*l.* to each of my said Daughters attaining the age of 21 Years, I will and direct that each and every Sum so set apart, shall be at the disposal, by Will, of every such Daughter in respect to her Legacy, and, for default of which, to be divided equally unto and amongst her Children, share and share alike; and in case of either *of my said Daughters so dying without having [*438] made any Testamentary Disposition thereof, and without leaving lawful Issue as aforesaid, then upon Trust to pay and divide such principal

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Sum or Sums as aforesaid, unto and amongst all and every my said Children living, share and share alike ; and in case all my said Children shall happen to depart this Life in the Lifetime of my said Wife, or under the said age of 21 Years, and without leaving lawful Issue of their, his or her Body, then I will and direct my said Trustees, or the Survivors or Survivor of them, from and after the Decease of my said Wife, to sell and dispose of, by public Auction or private Contract, the whole of my said Estate Real and Personal, and, after deducting the Expenses attending such Sale or Sales, then, with and out of such Monies, together with the Stock in the Public Funds, in Trust to pay the Sum of 500*l.* to the said *John Dyer*, if he shall be then living, and divide the remaining Sum into four equal Parts which I will and bequeath as follows." The Testator then gave one Fourth part to his Brother *John Miles*, if he should be then living, but if not, then to his Children, to be paid them at 21 ; one other Fourth part, to his Brother *George Miles*, if he should be then living, but, if not, then to the Persons entitled to the remaining three Shares ; and another Fourth part, in Trust for his Sister, *Rebecca Oakley*, for Life, for her separate use, and, after her Decease, in Trust to divide the same amongst all her Children who should attain 21, when they should attain that age ; and, as to the remaining Fourth part, upon similar Trusts for the benefit of his Sister, *Elizabeth Galindo* and her Children.

The Testator died in March 1814, leaving *Elizabeth Miles* his Widow, and four Children surviving him.

[*439] The Bill was filed by the Widow and Children, against the Executors and Trustees, and the Brothers and Sisters of the Testator and their Children, alleging that the Plaintiffs, the Children of the Testator, having all attained the age of 21 Years, had become entitled, absolutely, in equal Shares, to vested Interests in the Testator's general Residuary Estate, subject to the Payment of the Annuity of 400*l.* to their Mother, and that they were entitled to have the same assigned and transferred to them, their Mother being willing that such Transfer should be made, subject to providing for her Annuity : that the Defendants alleged that, according to the true Construction of the Will, if the Children of the Testator should all die in their Mother's Lifetime without leaving Issue, the contingent residuary disposition of the Testator's Property, in favour of his Brothers and Sisters, and their Children, would take effect.

The Bill prayed that it might be declared that the Defendants claiming to be such contingent Residuary Legatees, had not any Contingent or other Right or Interest in the Property or any part thereof, and that upon that footing, the Defendants, the Executors, might be decreed to convey and assign the Freehold and Leasehold Estates to the Plaintiffs, the Testator's Children, as

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absolutely entitled thereto, and to pay and transfer to them what was due in respect of the Rents and Profits of the Estates, and the Residue of the Personal Estate, or the Funds or Securities upon which the same were invested.

The Defendant, *Dyer*, demurred generally to the Bill.

*Mr. *Pepys* and Mr. *Wigram*, in support of the Demurrer: [*440]

The Testator's Children have all attained 21, but their Mother is still living. The Testator gives an Annuity of 400*l.* to his Wife, and 2,000*l.* to be paid to each of his Children, as they attain 21; and he then directs the Surplus Income of his Real and Personal Estate to be accumulated during the Life of his Wife, and that, after her Decease, his Estates shall be sold, and the Proceeds divided amongst his Children, on their attaining 21; but, in case all his Children should die in his Wife's Lifetime, or under 21, and without leaving Issue, then that the Proceeds of his Estates shall go over to his Brothers and Sisters and their Children. The enjoyment of the Surplus Income of the Estates, is not postponed on account of any Life Interest, but it is to accumulate during the Life of the Wife. The Children say that, having attained 21, they are become absolutely entitled to the Testator's Residuary Estate. But, if the Testator intended them to take all that was not given to his Wife, why did he give each of them 2,000*l.*, and direct the Residue to accumulate? The Construction that we contend for is a rational one, namely that none of the Children are to take, if they died before the period of enjoyment. The words, "And without leaving lawful Issue," are to be applied to both members of the Sentence. Whilst the Wife is alive, there can be no absolute Interest in the Children.

Mr. *Knight* and Mr. *Teed*, in support of the Bill, were stopped by the Court.

The VICE CHANCELLOR:

This Case is one of that numerous Class in which the word *or* ought to be read *and*. It is clear that the Testator did not mean [*441] the Trust Property to go over, if his Children attained 21, or if they died under 21 leaving Issue. He meant to put in opposition to each other, dying under 21 without leaving Issue, and attaining 21.

Demurrer overruled.

HODDER v. HAINES.

1832: 20th July.—*Practice*.—*Prisoner*.—*Contempt*.

An Order for the Discharge of a Prisoner from his Contempt, 2 & 3 W. 4, c. 58, may be made upon Motion, supported by the Certificate of the Deputy Warden of the Fleet.

A RECEIVER had been appointed of the Estates in this Cause; and an

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Injunction had issued against two persons, named *England*, who were not Parties to the Cause, to restrain them from cutting Timber on the Estates. Those Persons had violated the Injunction, and had been committed to the Fleet, for the Contempt.

Mr. *Blunt*, for the Prisoners, now moved (upon the Certificate of Mr. *Brown*, the Deputy Warden of the Fleet, submitting that the Prisoners had received a Punishment adequate to their Offence), that they might be discharged from their Contempt, under 2 & 3 Will. 4. c. 58 (a).

- [*442] *Mr. *Wray*, for the Receiver and some of the Parties in the Cause, submitted that as the Order now moved for would be the first that had been made under the Act, the form of it ought to be settled ; and he doubted whether it would be proper that the Prisoners should be discharged without the Facts of the Case being verified by the Certificate of the *Master* appointed to visit the Fleet, under 11 Geo. 4 & 1 Will. 4. c. 36, Rule 7.

The Registrar suggested that the Application ought to have been made by Petition.

The *Vice-Chancellor* said that it was not necessary to have the *Master's* Report ; for that the Certificate of the Deputy Warden of the Fleet, who was an Officer of the Court, afforded sufficient judicial information on the subject ; and that the Application was properly made by Motion. His *Honor* accordingly made the Order, on *hearing the Certificate of the Deputy Warden, read.*

(a) That Act. after reciting 11 Geo. 4, and 1 Will 4, c. 36 (for altering and amending the Law regarding Commitments by Courts of Equity for Contempts, and the taking of Bills *pro Confesso*), and 7 Geo. 4, c. 57 (for amending and consolidating the Laws for the Relief of Insolvent Debtors in *England*), enacts that, in all cases of Contempt, other than and besides those provided for by the last-mentioned Act, where any Person or Persons are or is, or shall, at any time hereafter, be in Prison, under or by reason of any Commitment or Attachment directed by or issued out of the Court of Chancery, or His Majesty's Court of Exchequer ; the Court of Equity by which such Commitment shall have been directed, or out of which such Attachment shall have issued, shall (upon the application of the Persons or Person against whom such Commitment or Attachment hath been directed or issued) have the power, if it shall so think fit, to discharge such Persons or Person from their, his, or her Contempt, except as to the Costs thereof, for which Costs they, he or she shall remain in custody ; and such Costs shall be deemed within the herein-before recited Provisions of the said last-mentioned Act, and they, he, or she shall be discharged therefrom, and from the Process of Contempt, in like manner as is in the said last-mentioned Act provided for, in Cases of Process of Contempt for Non payment of Money or Costs : provided that this Act shall not weaken any of the Powers, by the said Act passed in the first year of His present Majesty, given, and that nothing herein contained shall lessen the operations of the said Act for the Relief of Insolvent Debtors.

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*DAVIS v. REID.

[*443]

1832: 24th and 27th July.—*Demurrer*.—*Witness*.—*Costs*.

Demurrer by a Witness to answering Interrogatories, on the ground that he might subject himself to Penalties, allowed. Such a Demurrer may be allowed partially.

A Demurrer, by a Witness, to two Interrogatories was allowed as to one, and overruled as to the other. The Court gave the Witness half the Costs of the Demurrer.

A WITNESS examined for the Plaintiff on the 10th of July 1832, was described, in the Depositions, as *J. F. Menet*, of the Stock Exchange, *London*, Stock Agent. The Witness was asked, by the Fifth Interrogatory, whether the Defendants, or any and which of them, ever and when speculated in the Public Funds, or in any other and what manner; whether such Speculations, or any and which of them, were to a small or large Amount; and whether any Profits or Losses to a small or large Amount, were, and by whom, made or incurred thereby; and he was required to set forth a full and particular Account of all the Speculations in the Public Funds, or in any other and what manner, which any of the Defendants had been Parties or privy to, with the Time, Amount and Nature thereof respectively, and the Profits made thereby, and by whom.

By the Eighth Interrogatory, the Witness was asked whether the Defendants, or any and which of them, were not, on the Settling Day in October 1830, Holders or a Holder of Stock, or other and what Securities, to any and what Amount, and had or not any Differences or Difference, and to what Amount, to pay on such Settling Day; whether they, or any and which of them, did not continue the Stock or Securities of which they or he were or was Holders or a Holder, until the Settling Day in November 1830, or some other and what time, and had or not any Differences or Difference, and why, and to what Amount, to pay on the last mentioned Settling Day.

*The Witness demurred to the above Interrogatories. In the [*444] Title to the Demurrer, he was described as in the Depositions.

The ground of Demurrer was that, if he were to answer the Interrogatories, it might tend to render him liable to Penalties; and, therefore, he submitted to the judgment of the Court, whether he should make any Answer thereto.

Mr. *Turner*, in support of the Demurrer, referred to 7 Geo. 2, c. 8, commonly called the Stockjobbing Act (a). If the Witness ad-

(a) The 8th Sect. of the Act enacts that all Contracts and Agreements whatsoever, which shall, from and after the 1st day of June 1734, be made or entered into for the buying, selling, assigning, or transferring of any Public or Joint Stock or Stocks, or other Public Securities

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[*445] mits that he has been concerned *in any of the Transactions to which these Interrogatories refer, he will be subject to the Penalties imposed by the Act. How can he know whether Profits or Losses were made or incurred by the Speculations, or whether they were to a large or small Amount, unless he was concerned in the Transactions ? It is impossible for him to Answer, without convicting himself.

Sir *E. Sugden* and Mr. *Chandless* against the Demurrer :

The Witness must show that he is in a situation in which he would be subject to Penalties, if he answered the Interrogatories (*b*). He [*446] does not state whether he *was Broker, Agent or Principal. He ought to have stated, in the Demurrer, that he was employed, as a Broker, or Agent, in the Transactions to which the Interrogatories relate. He may know the whole of the Transactions, without having been engaged in them in any one of those Characters. For any thing that appears to the contrary, he may have been told all the Transactions by the Defendants. The word *Agent* is of uncertain import. At all events there are many parts of these Interrogatories which the Witness must answer. He must state whether the Defendants were Holders of Stock, and whether they

whatsoever, or of any Part, Share or Interest therein, whereof the Person or Persons contracting or agreeing, or on whose behalf the Contract or Agreement shall be made, to sell, assign and transfer the same, shall not, at the time of making such Contract or Agreement, be actually possessed of, or entitled unto, in his, her, or their own right, or in his, her or their own Name or Names, or in the Name or Names of a Trustee or Trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every Person and Persons whatsoever contracting or agreeing, or on whose behalf, and with whose consent, any Contract or Agreement shall be made, to sell, assign, or transfer any Public or Joint Stock or Stocks, or other Public Securities, whereof such Person or Persons shall not, at the time of making such Contract or Agreement, be actually possessed of or entitled unto, in his, her, or their own Name or Names, or in the Name or Names of a Trustee or Trustees, to their use, or their own right as aforesaid, shall forfeit and pay the Sum of 500*l.*, to be recovered by Action of Debt, Bill, Plaint, or Information, in any of His Majesty's Courts of Record at *Westminster*, in which no Essoign, Privilege, Protection, or Wager of Law, or more than one Imparance shall be allowed; one Moiety thereof to the use of His Majesty, his Heirs and Successors, and the other Moiety thereof to the use of him, her, or them who shall sue for the same; and all and every Broker or Brokers, Agent or Agents, who shall negotiate, transact or intermeddle in the making or procuring to be made any such Contract or Agreement as aforesaid, and shall know that the Person or Persons, by whom or on whose behalf such Contract or Agreement shall be made, is or are not possessed of, or entitled unto the Stock or Security concerning which such Contract or Agreement shall be made, in his, her, or their own Name or Names, or in the Name or Names of a Trustee or Trustees for their use or right, shall, for every such Offence, forfeit and pay the Sum of 100*l.*, to be recovered by Action of Debt, Bill, Plaint, or Information, in any of His Majesty's Courts of Record at *Westminster*, in which no Essoign, Privilege, Protection or Wager of Law, or more than one Imparance shall be allowed; one Moiety thereof to the use of His Majesty, his Heirs and Successors, and the other Moiety thereof to the use of him, her, or them who shall sue for the same."

(*b*) The Demurrer did not, in the *Body* of it, state that the Witness was either a Broker, or an Agent.

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speculated in any other and what manner. The Penalties are not recoverable after the expiration of Two Years from the time when the Offence was committed (*c*). Therefore he is bound to answer as to Speculations prior to July 1830. *Green v. Weaver* (*d*), *Jackson v. Benson* (*e*), *Vaillant v. Dodmead* (*f*), *Parkhurst v. Lowten* (*g*).

Mr. Turner in reply :

Two Years have not elapsed since October 1830. Notwithstanding the time for suing for the Penalties may have expired, the Witness will still be liable to be indicted for a Misdemeanor.

[The *Vice-Chancellor* :—Is that so in a Case where an Act of Parliament declares that an Act shall not be done, and, if it is done, that the Party shall be subject to a specific Penalty (*h*)?]]

*The Witness describes himself as a Stock Agent.

[*447]

[The *Vice-Chancellor* :—I take the Description of him, in the Deposition, to be the Plaintiff's Description.]]

In *Green v. Weaver*, the Plaintiffs had employed the Defendants as their Brokers ; and the ground of the Decision was that the Defendants had, by Contract, deprived themselves of the Protection which the Rules of the Court would have otherwise afforded them. Here the Witness is required, by the Plaintiffs, to answer as to Transactions in which the Defendants, and not the Plaintiffs, were concerned.

The VICE-CHANCELLOR :

As the Plaintiff has described the Witness as a Stock Agent, I must take it for granted that he is one. It was not necessary for him to state more than he has done.

The Demurrer must be allowed as to the Eighth Interrogatory ; but, before I pronounce any Decision as to *the Fifth, it [*448] will be right that the Point as to the liability of the Witness to be indicted for a Misdemeanor, after the time for suing for the Penalty has expired, should be looked into.

Sir E. Sugden :

If the Demurrer is not good as to both the Interrogatories, it ought to be over-ruled, as being too extensive.

(*c*) See 31 Eliz. c. 5. s. 5.

(*d*) *Ante*, Vol. I. p. 404.

(*e*) 1 Youn. & Jer. 32.

(*f*) 2 Atk. 524.

(*g*) 2 Swans. 194 ; see 204.

(*h*) Serjeant Williams, in a Note to *The King v. Dickenson*, 1 Saund. 135, says : " The distinction seems to be this : where a Statute makes unlawful that which was lawful before, and appoints a specific Remedy, that Remedy must be pursued, and no other. But where an Offence was antecedently punishable by a Common Law Proceeding, as by Indictment, and a Statute prescribes a particular Remedy, there such particular Remedy is cumulative, and Proceedings may be had either at Common Law or under the Statute. And, in *Roberts v. Allatt*, 1 Mood. & Malk. 192, Lord Tenterden, C. J. ruled that a Witness is not excused from answering a question on the ground that the Conduct inquired into on his part, would subject him to a Penalty, if the time limited for proceeding for the Penalty is past.

 1832.—Wyatt v. Sadler.

Mr. *Turner* gave up the Point as to the Witness being subject to an Indictment for a Misdemeanor, after the time for suing for the Penalty had elapsed.

The *Vice-Chancellor* allowed the Demurrer as to the Eighth Interrogatory, and, as to so much of the Fifth as related to Transactions within Two Years, but declared that the Witness was bound to answer as to Transactions prior to that time.

His *Honor* gave the Witness half the Costs of the Demurrer, in analogy to the Practice where two Exceptions are taken, one of which succeeds, and the other fails.

[*449]

WRIGHT v. WRIGHT.

1832: 3d August.—*Heir.—Costs.*

In a Suit to establish a Will, one of the Witnesses could not depose, positively, to the due attestation of it; and an Issue was directed, at the Heir's request. The Verdict was against the Heir: but the Court gave him his Costs both at Law and in Equity.

THIS was a Suit to establish a Will against an Heir-at-Law. One of the Witnesses to the Will, said that he did not recollect or believe that the Will was signed by him in the Testator's presence. The Heir then asked for an Issue to try the Validity of the Will. On the trial of the Issue, the Will was found to have been duly executed and attested; and, on the Cause coming on for Further Directions, the Will was established. The Heir then asked for his Costs both at Law and in Equity: which the Court granted (a).

Mr. *Beames*, for the Heir. Sir *E. Sugden* and Mr. *Barber*, for the other Parties.

[*450]

WYATT v. SADLER.

1832: 4th August.—*Practice.—Fifty-sixth Order.—Conduct of Suit.*

Notwithstanding the *Master* may have refused an Application under the 56th Order, to take the prosecution of a Decree from the Plaintiff, and commit it to another Party, the Court is at liberty to grant the Application, the *Master's* Judgment not being final.

THIS was a Creditor's Suit. Under the 56th of Lord *Lyndhurst's* Or-

(a) See *Beames* on Costs, 94, *et seq.*

 1832.—Ex parte Barber, In re Tyas.

ders, an Application had been made to the *Master*, on behalf of two persons named *Suter* and *Brooksbank*, who had been allowed, by the *Master*, to be Creditors on the Testator's Estate, that the further prosecution of the Decree might be committed to their Solicitor, instead of the Plaintiffs. The *Master* having refused the Application, a Motion was now made, on behalf of the same Persons, for the same purpose.

Mr. *Knight* and Mr. *Koe*, in support of the Motion.

Mr. *Pepys* and Mr. *Wilbraham*, for the Plaintiffs, said that the 56th Order left it, *entirely*, to the *Master*, to decide whether the prosecution of a Suit should be taken out of the Plaintiff's hands or not, as he was best able to judge whether the Suit had been prosecuted with due diligence, or not; and that, in this Case, the *Master* had exercised his Judgment, and refused to take, from the Plaintiffs, the conduct of the Cause.

The VICE-CHANCELLOR:

I cannot agree with the counsel for the Plaintiffs, as to their construction of the Order, that the *Master's* Judgment is to be Final: and I am of opinion that there has been so much delay, on the part of the Plaintiffs, in this Case, that I ought to make an Order according to the Notice of Motion.

Costs of the Motion to be Costs in the Cause.

*EX PARTE BARBER, IN RE TYAS.

[*451]

1832: 6th August.—Will.—Devise.—Construction.—Mortgage.

Devise of all Testator's Freehold Estates, and all his Farming Stock, Ready Money, Bills, Bonds, Notes and other Securities for Money, and all the Residue of his Personal Estate, to Trustees, their Heirs, Executors, &c., in Trust to sell his Real Estates, and to sell, get in and convert into Money all his Personal Estate, will pass a Mortgage in Fee.

By Indentures of the 2d and 3d of March 1821, *James Beal* made a Mortgage in Fee, of certain Messuages, Lands and other Hereditaments in *Yorkshire*, to *Joseph Tyas*, for securing the Repayment of 550*l.* with Interest, on the 3d of September then next.

Joseph Tyas, by his Will, dated the 26th of October 1822, after bequeathing his Household Furniture, Plate, China and Linen, gave, devised and bequeathed all his Freehold Messuages, Dwelling houses, Lands, Tenements and Hereditaments whatsoever and wheresoever, and all his Farming Stock and Utensils, Ready Money, Bills, Bonds, Notes and other Securities for Money, Book-debts and all other the Residue and Remainder of his Personal Estates and Effects, to certain Persons therein named, their Heirs, Executors, Administrators and Assigns, according to the Nature and Tenure of the said

1832.— Ex parte Barber In re Tyas.

Estates and Premises respectively, upon Trust that they or the Survivors or Survivor of them, or the Heirs, Executors or Administrators of such Survivor, should, as soon as conveniently might be after his decease, either by Public Auction or Private Contract, or partly by Public Auction and partly by Private Contract, and together or in Parcels, as they or he should think fit, absolutely sell and dispose of all and every his said Freehold Estates and Premises thereinbefore to them devised, to any Person or Persons whomsoever, for the most Money and best Price or Prices that could be [*452] reasonably obtained for the same, and should convey the *same, when sold, unto the Purchaser or Purchasers thereof, or as he, she, or they should appoint, and also should sell and dispose of, collect, get in, and convert into Money, all his Personal Estate and Effects thereinbefore to them bequeathed (except such Part thereof as should consist of Ready Money); and he thereby declared and directed that the said Trustees, and the Survivors and Survivor of them, and the Executors and Administrators of such Survivor should stand and be possessed of the Monies to arise and be produced from such Sale or Sales, and to be so collected, gotten in and received by them as aforesaid, and also of such Ready Money as he might have at the time of his decease, upon the Trusts therein mentioned, and he thereby appointed the said Trustees Executors of his Will.

Upon a Petition presented in March 1832, by *William Barber*, the surviving Trustee of the Will of *James Beal*, the Mortgagor, it was referred to the *Master* to inquire whether *John Tyas*, the Infant Heir of the Mortgagee, was an Infant Trustee or Mortgagee, as to the Hereditaments comprised in the Indentures of March 1721, within the 6 Geo. 4, c. 74, and 1 Will 4, c. 60. The *Master* certified that the 550*l.*, together with an arrear of Interest still remained due from the Estate of the Mortgagor and that he was of opinion that the mortgaged Estate passed, by *Tyas's* Will, to the Devisees therein named, upon the Trusts therein mentioned, and, consequently, that the Infant was not an Infant Trustee or Mortgagee within the Acts mentioned, or either of them.

Barber then presented a Petition, praying that it might be declared that the mortgaged Estate did not *pass by the Will, [*453] to the Devisees; and that it might be referred back to the *Master* to review his Report.

Sir *E. Sugden* and Mr. *Garrett*, for the Petitioner, cited *Galliers v. Moss* (a), and said that this was a stronger Case for holding that the mortgaged Estate did not pass by the Will, because the Testator had directed his Freehold Estates to be sold; and therefore that it could not pass under the Devise of the Testator's Freehold Estates; and that the Case cited was an express

(a) 9 Barn. & Cress. 267.

1832.—Ex parte Barber In re Tyas.

Decision that it could not pass under the words, "Securities for Money." *Silvester v. Jarman* (b); *Doe v. Reade* (c).

Mr. *Duckworth*, in support of the Report, said that *Galliers v. Moss* was an Authority in his favor; for it appeared, by the Judgment, that if, as in this Case, the words "Heirs" had been found in the Clause in which the Testator disposed of his Securities for Money, the Court could have held that the mortgaged Estate did pass by the Will. *Renvoize v. Cooper* (d); *Silberschildt v. Schiott* (e); *Ex parte Whitacre* (f).

Sir *E. Sugden*, in reply :

It is clear, from the Trusts to which the Freehold Estates are dedicated, that the Testator was speaking of his own Property only, and that he did not mean to include the mortgaged Estate. It is also clear that, in the subsequent part of the Clause, he was disposing of his Personal Property only. The money passes, but the Security for it does not. [*454] Case is not distinguishable from *Galliers v. Moss*. Was there more inconsistency in giving the mortgaged Estate to the Family of the Testator, in that Case, in succession, than in directing it to be sold. In *Renvoize v. Cooper* the words, "Mortgages and Securities for Money" were used; and it was a separate Devise to the Testator's Widow.—The mortgaged Premises did not pass under the word "Freehold Estates," as the Testator had devised them for Sale, as his own Property; and they cannot pass as Securities for Money, for the Testator has confined those words to Personal Property.

THE VICE-CHANCELLOR :

There is a distinction between this Case and *Galliers v. Moss*. In that Case the Testator devised all his Manors, Messuages, Farms, Lands, Tenements, Tithes, Hereditaments and Estate, to the Trustees, their Heirs and Assigns, until such time as *W. E. Shore* should attain his Age of 21 years; or, in case of his death before he shall attain that Age without leaving Issue Male of his Body lawfully begotten, then until such time as his Sister, *Mary Shore*, shall attain her Age of 21 years: and then the Trusts are declared of the Real Estates. In a subsequent part of his Will, the Testator bequeaths his Stock in Trade, Cotton-mill, Machinery, Cupola Furnace, Mineral Tools, Implements and Utensils, Ready Money, and *Securities for Money*, Debts, Personal Estate, Effects, of what nature and kind soever and wheresoever, to the Trustees, their Executors, Administrators and Assigns. And Mr. *Justice Bayley* states it to be the opinion of the Court that the Mortgaged Estate would not pass under that Clause, because the word "Heirs" was not

(b) 10 Price, 78.

(c) 8 T. R. 118.

(d) Madd. & Geld. 371.

(e) 8 V. & B. 45.

(f) 1 Sanders on Uses, 285, note.

1832.—Marshall v. Oxford.

found in it. But, in this Case, there is one, general Gift of the [*455] Testator's *Freehold Messuages, Dwelling-house, Lands, Tenements and Hereditaments whatsoever and wheresoever, and all his Farming Stock and Utensils, Ready Money, Bills, Bonds, Notes, *and other Securities for Money*, Book-debts, and all other the Residue and Remainder of his Personal Estate and Effects, to the Trustees, their *Heirs*, Executors, Administrators and Assigns. So that here the two Gifts are combined : and, in that respect, this Case differs from *Galliers v. Moss*. Then, having given the Property to the Trustees, their *Heirs*, Executors, Administrators and Assigns, he directs them to sell and dispose of all his Freehold Estates, and to sell and dispose of, collect, get in and convert into Money all his Personal Estate and Effects thereinbefore bequeathed to them. I think that a plain Intention is manifested, by the Language of this Will, that complete Dominion, for the purpose of converting the whole Estate into Money, should be given to the Trustees ; and, in that respect, it differs from *Galliers v. Moss*.

My opinion, therefore, is that the *Master* is right : I will however, if the Parties wish it, send a Case for the Opinion of a Court of Law upon the Question (g).

[*456]

*MARSHALL v. OXFORD.

1832 : 6th August.—*Solicitor and Client*.—*Costs of Taxation*.

The Plaintiff had obtained an Order for Taxation of his Solicitor's Bill amounting to 399*l*.

The Solicitor, with the *Master's* permission, struck out certain Items, as having been inserted by mistake. The Bills were then taxed, and less than a Sixth was taken off, but, if the Items struck out were included, then more than a Sixth would have been taken off. Held that, as less than a Sixth had been taken off, the Plaintiff must pay the Costs of Taxation.

AN Order had been obtained, by the Plaintiff, for the Taxation of his Solicitor's Bills of Costs in this Cause, amounting to 399*l*. After the Bills had been carried into the *Master's* Office, the Solicitor, with the *Master's* permission, struck out certain Items, which, as he alleged, had been inserted by mistake. The Bills were then taxed, and less than a Sixth was taken off ; but, if the Items struck out had been included, more than a Sixth would have been taken off.

The Solicitor now petitioned that the Plaintiff might pay the Costs of Taxation.

(g) No Case was taken.

1832.—*Severn v. Fletcher.*

Mr. *Knight*, for the Solicitor, contended that he was entitled to be paid the Costs, as less than a Sixth had been taxed off.

Mr. *Ching*, for the Plaintiff, cited *Rigby v. Edwards* (a), and said that, in *Pytches v. Revett* (b), Lord *Eldon*, C., reviewed his decision in *Rigby v. Edwards*, and seemed to doubt the propriety of what he had done: that, in this Case, the Solicitor had delivered his Bills, to his Client, amounting to a particular Sum: that the Order for Taxation identified those Bills, by stating them to amount to that Sum; and, therefore, that the "Items which the Solicitor had struck out, ought to be considered [*457] as taken off on Taxation; and, consequently, that the Costs ought to be paid by the Solicitor.

The *Vice-Chancellor* said that, in *Pytches v. Revett*, Lord *Eldon* had not doubted the propriety of his decision in *Rigby v. Edwards*, and that as, in this Case, less than a Sixth had been taken off the Bills on Taxation, the Costs ought to be paid by the Plaintiff.

SEVERN v. FLETCHER.

1832: 1st November.—*Cross Bill.—Bill of Discovery.—Amendment.*

Defendant filed a Cross Bill for a Discovery. The plaintiff in the original Suit, took an Office-copy of, but did not answer the Cross Bill. After the hearing of the original Cause, Defendant amended his Cross Bill, by praying relief. Held that, under the circumstances he was at liberty so to do.

THE original Bill was filed by the Assignee of a Share of a Legacy, for payment of that share. The Assignor filed a Cross Bill for a Discovery, alleging that the Assignment had been obtained by Fraud. The Plaintiff to the original Bill had taken an Office copy of, but had not put in any Answer to the Cross Bill; and, the original Suit having been heard, the Bill of Discovery became useless. The Plaintiff in the Cross Bill then amended it, by converting it into a Bill for Relief, but did not introduce any new Allegation.

Mr. *Turner*, for the Plaintiff in the original Suit, now moved that the Amendment in the Cross Bill might be expunged, and that his Client might be paid the Costs he had incurred in the Cross Suit. *Butterworth v. Bailey* (a).

(a) 5 Madd. 20. The Motion to discharge the Order made in that Case. is reported in Beames on Costs, 382.

(b) Beames on Costs, 385.

(a) 15 Ves. 358.

36

1832.—Pyne v. Franklin.

Mr. *Jeremy*, for the Plaintiff in the Cross Bill, said that, in [*458] the Case cited, the Amendment was made after *Answer, and that it appeared, from the Judgment, that that was the principle upon which the Decision proceeded.

The VICE-CHANCELLOR:

I think that, under the special circumstances of this Case, Mr. *Jeremy's* Client ought to be at liberty to convert his Bill of Discovery into a Bill for Relief. A Cross Bill is to be treated with greater indulgence than an original Bill. I shall not, therefore, grant the Application, but shall order the question as to the payment of Costs, to stand over till the hearing of the Cross Cause: nor shall I give any Costs of the Application, as it is a new Point.

PYNE v. FRANKLIN.

1832: 3d November.—*Bill.—Construction.*

Testator gave 200*l.* to each of his Nieces and their Children, to be paid within nine months after the death of his Wife, amongst his Nieces and their Children, as his Wife should by Will, appoint. The Wife died, without having made any Appointment. The Executors, within nine months after her death, paid the Legacies to the Nieces. They afterwards died without having had any Children. Held that the Payment was properly made.

TESTATOR bequeathed the Residue of his Personal Estate to his Widow, subject to the payment of two Legacies of 200*l.* each, to his Nieces, *Agnes* and *Frances* and their Children, to whom he gave the said Legacies, and to be paid, in Nine Months after the death of his Wife, in such Shares, Proportions, manner and form, as his Wife should, by her Will, appoint, amongst his Nieces and their Children.

The Wife died without having made any Appointment; and, [*459] within Nine Months after her death, the Executors *paid the Legacies to the Nieces. Both of them afterwards died, without ever having had any Issue.

The question, on the hearing of a Petition in this Cause, was whether the Payments had been properly made, so as to entitle the Executors to be allowed them in their Accounts, or, in other words, whether the Nieces were entitled to the Legacies, for their Lives only, in which case they had fallen into the Residue of the Testator's Estate.

Mr. *K. Parker*, in support of the Petition.

The *Vice-Chancellor* said that the Legacies were directed to be paid within Five Months after the death of the Widow, and, as neither of the Nieces

1832.—King v. Shrivcs.

had a Child, there were no Persons to whom the Legacies could be paid, except the Nieces, they, therefore, must, of necessity, take the whole of the Legacies; and, consequently, that the Payments had been properly made and ought to be allowed (a).

*STULZ v. STULZ.

[*460]

1832: 7th November.—Practice.—Evidence.

A Party cannot, at the hearing, give secondary Evidence of the Contents of a Document in his Adversary's possession, unless he has given him Notice to produce it. The Depositions are not sufficient Notice.

AT the hearing of this Cause, the Plaintiff's Counsel proposed to give secondary Evidence of a written Instrument which was in the Defendant's possession. The Defendant's Counsel objected to the admissibility of such Evidence, on the ground that no notice to produce the original, had been given to the Defendant.

The Plaintiff's Counsel then cited *Wood v. Strickland* (b), in which Case Sir William Grant, M. R. decided that, in this Court, it was not necessary to give notice to produce a written Instrument in the possession of an adverse Party, because that Party, before the hearing, must be fully apprized, by the Depositions, of all the Parol Evidence given on the other side, and must know that the contents of the Instrument in his possession, would come into question.

The Vice-Chancellor said that, on a former occasion (c) he had decided contrary to *Wood v. Strickland*, because he thought that the grounds on which that decision had been made, were insufficient; but that he was willing to have the point argued, in order that the Practice might be settled.

The objection was afterwards waived.

Sir E. Sugden, Mr. Knight, and Mr. Treslove, were Counsel in the Cause.

*KING v. SHRIVES.

[*461]

1832: 12th November.—Will.—Construction.—Estate.

Testator devised all his Goods, Chattels, Estate and Effects, of what Nature soever, and where-soever, not thereby otherwise disposed of, to his Executors, upon the Trusts after mention-

(a) *Cook v. Cook*, 2 Vern. 545.(b) In *Hawkesworth v. Dewsnap*, Nov. 1831.

(c) 2 Mer. 461.

1832.—King v. Shriver.

ed. He then willed that all his Debts, &c. should be paid, and that what remained of his Personal Effects should be appropriated for the benefit of his Family, as his Executors should think proper; next he willed that his Family should be placed in his Farm, subject to the direction and control of his Executors, and that, when his youngest Son attained 21, it should be sold, and the Produce divided amongst his Wife and Children. Held that the legal Fee in the Farm passed to the Executors, and that they were entitled to sell it for payment of the Testator's Debts.

WILLIAM KING, Farmer, being seised of a Freehold Farm, in the County of Bedford, made his Will, dated the 15th of January 1823, which was as follows: "I give and bequeath, unto my Brothers, *James King* and *John King*, all my Goods, Chattels, *Estate* and Effects, of *what nature, sort, kind, quantity or quality soever and wheresoever, not hereby otherwise disposed of*, upon Trusts and to and for the Uses, Intents and Purposes hereinafter mentioned, viz. First, I will that all my just Debts, Funeral Expenses, &c. &c. be fully paid and discharged, and that whatsoever remains (after such discharge) of my *Personal Effects*, shall be appropriated to the Use, Interest and Benefit of my Family, now residing with me, that is to say, my Wife *Helena* and eight Sons conjointly, in such way and manner as shall, in the discretion of my Executors, appear most proper. Secondly, I will and appoint that my Family now residing with me as aforesaid, be placed in the Farm (my own Estate and at present occupied by myself) to occupy and manage it for their mutual advantage, until my youngest Son, now about Five Years old, shall arrive at the age of 21 Years, yet nevertheless under the direction and control of my said Executors, who shall

have the power to interfere, in case any Difference or Misunderstanding [*462] shall arise between them, to use their best endeavour to reconcile such Differences, or rectify such Misunderstanding, to secure peace and harmony among them, and, if this object cannot otherwise be effected, I will and desire them to exercise the discretionary power I have herein given them, by making such Regulations or even Separations among them as may appear necessary for this important purpose. Furthermore, thirdly, at the period above alluded to (viz. when my youngest Son shall have attained the age of 21 Years,) I will and appoint that my said Estate shall be disposed of or sold, and that the Produce thereof shall be divided into Three equal parts, and that Two of those parts be divided, equally, between all my Children, (nine (a) in Number), Share and Share alike. I will, moreover, that the one remaining Third Part be placed at Interest, on good Security, for the benefit of my Widow, during the term of her natural Life, or so long as she shall continue my Widow, and, at her demise, or in case of a second marriage, I will also that the said Third Part

(a) So in Brief.

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appropriated to her use during her natural Life, shall likewise be called in and divided among my surviving Children, in like manner as the other two Third Parts, Share and Share alike ; and I do hereby nominate, constitute and appoint the above named *James King* and *John King*, Executors of this my Will."

The Testator died in February 1825. At the time of his decease he was seised in Fee of the before-mentioned Farm, and of no other Freehold Estate. The Farm, was, at his death, subject to a Mortgage for a Term of Years created, by the Testator, for securing 300*l.* and Interest ; which Principal Sum, together with an arrear of Interest, remained due.

*The Testator left his Wife and eight Sons him surviving. At [*463] the time of filing the Bill, the youngest Son was 15 Years old. Besides the Mortgage Debt, the Testator, at his Death, was indebted to various Persons by simple Contract ; and, his Personal Estate being insufficient to pay his Debts, his Executors entered into a Contract, with the Defendant *William Shives*, to sell the Farm to him for payment of the Testator's Debts.

The Bill was filed to compel a Specific Performance of the Contract. The Defendant objected to the Title, on the ground that no power to Sell or Mortgage the Farm, was given to the Plaintiffs ; for, although the Testator, by his Will, gave, to the Plaintiffs, all his Goods, Chattels, Estate and Effects not thereby otherwise disposed of, for payment of his Debts, yet such Gift was not intended to include, and did not and could not include any other than the Testator's Personal Estate. The *Master* having reported against the Title, the Plaintiffs excepted to the Report.

Sir *E. Sugden* and Mr. *Campbell*, in support of the Exceptions, said that a gift of all a Testator's Estate of what nature, sort, kind, quantity or quality soever and wheresoever, though preceded by the words, " Goods and Chattels," was sufficient, according to the decided Cases, to pass a Real Estate ; that, if there could be any doubt whether the Farm agreed to be sold, passed by the first Clause in the Will, it was removed by the Context : for, first, the Executors were directed to pay the Testator's Debts : secondly, to place his Family in the management of the Farm, subject to their control and interference ; and, thirdly, they were to sell the Farm at a particular period, and to dispose of the Produce in a certain [*464] manner.

Mr. *R. Roupell*, in support of the Report, said that the word " Estate," coupled with words applicable to Personalty only, did not, of necessity, pass Real Estate : that the words, " not hereby otherwise disposed of," were conclusive of the question ; as the Farm *was* otherwise disposed of by the Will ; that the Testator contemplated that his Personal Estate would be more than

1832.—Turner v. Frederick.

sufficient for payment of his Debts, as he had directed how the Surplus of it should be disposed of: that he had directed that his Family should be put into the possession of the Farm, and had restricted the power of interfering given to the Trustees, to cases of Family Disputes; and that he had directed that the Farm should be sold at a particular period, which would have been useless, if he had intended that it should be sold, in the first instance, for payment of his Debts. *Bailis v. Gale (b)*; *Wilkinson v. Merryland (c)*; *Shaw v. Bull (d)*.

The VICE-CHANCELLOR:

It is plain that, according to the true construction of this Will, the legal Estate in Fee, in the Farm contracted to be sold, passed to Trustees. Supposing that the first words alone are not sufficient to pass it, yet, when we look at the whole Will, no doubt can be entertained upon the subject. The Testator first wills that all his Debts shall be paid, that is so far as his Property will extend. He supposes that it will be more than sufficient [*465] for that purpose. He then directs his Family to be put in *possession of the Farm, subject to the control and interference of his Executors in certain cases; and then they are to sell it at a given period. I cannot, therefore, but think that the Legal Estate in Fee passed to the Executors. But, although my opinion is very clear upon the point, I will send a Case for the opinion of a Court of Law, if the Purchaser wishes it.

The Purchaser took a Case for the opinion of the Judges of the Common Pleas, who certified that the Executors were entitled to sell and convey the Farm, to the Defendant, for payment of the Testator's Debts (e).

The Cause came on to be heard, for Further Directions, on the 26th April 1834, when the *Vice-Chancellor* confirmed the Certificate, allowed the Exception and decreed a Specific Performance of the Contract, and that the Purchase-money, with Interest at 4l. per cent. from the day mentioned in the Agreement, together with the Costs both at Law and in Equity, should be paid by the Defendant.

[*466]

*TURNER v. FREDERICK.

1832: 13th November.—Will.—Construction.—Cross Limitations.

Testator gave an Annuity, to which he was entitled for the life of E., to his Daughter L. for life, and, after her death, to her Children, but if she should not have any who should survive E., then to such Persons as should then be entitled to the Testator's Personal Estate. He then disposed of all his Estate amongst his Sons and Daughters, giving the Shares of

(b) 3 Vez. 48.

(d) 12 Mod. 593.

(c) Cro. Car. 447.

(e) See 10 Bing. 238.

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his Sons to them, absolutely, and the Shares of his Daughter to Trustees for them, for their *respective* lives, and, after their deaths *respectively*, to apply the Interest of the Shares of his Daughters *respectively*, for the Maintenance of their *respective* Children until they attained 21, and then to divide the Principal amongst such Children *respectively*, as should attain that age. But if all such Children of his Daughters *respectively*, or both of them, should die under 21, then upon trust to pay the said *Trust-money*, to such Persons as should then be entitled to his Personal Estate. A., one of the Testator's Daughters, died, leaving Children who attained 21: then L., the only other Daughter, died without Issue. Held that Cross Limitations were not to be implied between the Children of the Daughters, and that the Persons who were to take under the Gift over, were not sufficiently described, and, therefore, that the Annuity and L.'s Share of the Residue, must go as in case of an Intestacy.

SIR CHARLES FREDERICK, Knight, by his Will, dated the 20th of September 1784, gave, to his Executors, an Annuity which he had purchased for the life of his Son *Edward*, upon Trust to pay the same for the separate use of his Daughter *Lucy*, during her life, if his Son *Edward* should so long live, for her separate use. And he directed that, in case his Son *Edward* should survive his Daughter *Lucy*, his Trustees, after his Daughter's decease, should pay the Annuity, during his Son *Edward's* life, amongst the Child, or Children (if more than one) of his Daughter *Lucy*, share and share alike, but if she should die without having any Child or Children, or such Child or Children should die in the lifetime of his Son *Edward*, then, that the Executors should, from thenceforth, pay the Annuity to and amongst *such Person or Persons as should then be en- [*467]* titled to his Personal Estate. And the Testator gave all his Real and Personal Estate to his Executors, in Trust to sell the same, and, out of the Money thereby arising, after payment of his Debts and Legacies, to pay to his Son, *Charles*, for his life, an Annuity of 200*l.*; and he gave the Residue of the Money arising as aforesaid, to his Sons *Thomas Lennox Frederick* and *Edward Boscawen Frederick*, and his Daughters, *Augusta* and *Lucy*, equally to be divided amongst them, the Shares of his Sons to be paid to them *respectively*, but the Shares of his Daughters to be invested in Government or Real Securities, in the Names of his Executors, upon Trust to pay the Interest or Dividends thereof to his Daughters *Augusta* and *Lucy*, *respectively*, for their lives, for their *respective* own sole and separate use, and, from and after the decease of his said Daughters *respectively*, in Trust to apply the Interest or Dividends of the Shares of his Daughters *respectively*, in the Maintenance and Education of their *respective* Children, until such Children, if more than one, should *respectively* attain the age of 21, and then to divide the Principal amongst such Children *respectively* as should attain that age: "But if all such Child or Children of my said Daughters *respectively*, or both of them, shall die under the age of 21, then upon Trust that my said Executors shall and do pay the said *Trust-money* and the Interest and Proceeds thereof, to such Per-

1832.—Turner v. Frederick.

son or Persons as shall then be entitled to my Personal Estate:" and he appointed his Son, *Thomas Lennox Frederick*, and *Lough Carlton*, Executors of his Will.

The Testator died in December 1785, leaving his Children named in his Will surviving him.

[*468] "The Executors converted into Money all the Testator's Real and Personal Estate, and paid one Fourth of the Proceeds to *Edward Boscawen Frederick*, another Fourth, to *Thomas Lennox Frederick*; and they invested the two other Fourth Parts as directed by the Will. *Charles Frederick* died in 1789, intestate, and *E. B. Frederick* took out Administration to him. *Thomas Lennox Frederick* survived his Co-executor *Carlton*, and died in November 1799, having appointed his Widow his Executrix. She afterwards died, and appointed the Plaintiffs her Executors, who thereby became the Representatives of *T. L. Frederick*, and also of the Testator. *Augusta* married *T. Prescott*, and died in 1806, leaving her Husband and five Children surviving her, and her Husband took out Administration to her. After her decease, the Executors divided one of the Fourth Parts of the Testator's Estate which had been invested as before mentioned, amongst her Children. *Lucy* died in September 1831, without Issue. *Edward Boscawen Frederick* was her Executor.

The Stock purchased with the Fourth Part of the Testator's Property to which his Daughter *Lucy* had been entitled for life, still remained in the Names of his Executors.

The Bill was filed by the Representatives of *Thomas Lennox Frederick*, who survived *Carlton*, the other Executor, against *Edward Boscawen Frederick* and the Husband and Children of *Augusta Prescott*, praying that the Rights and Interests of the several Parties interested in the Stock, and in the Annuity payable during the life of *Edward Boscawen Frederick*, might "be declared, and that the same might be divided amongst the Persons who should be declared entitled thereto.

Sir *E. Sugden* and Mr. *Tennant*, for the Plaintiffs:

The Children of Mrs. *Prescott* contend that the words: "But if all such Child or Children of my said Daughters respectively, or both of them, shall die under the age of 21 years, then upon Trust that my said Executors shall and do pay the said Trust Money, and the Interest and Proceeds thereof, to such Person or Persons as shall then be entitled to my Personal Estate," introduce a Gift over to them. But that is not so. The whole frame of the Will shows that the Testator intended equality amongst his Children. The word "respectively" is a word of severance, and the words "or both of them" are put in opposition to it. What the Testator meant, was that, if the Children of either of his Daughters should die under 21,

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then the Trust Money, that is the Share to which that Daughter was entitled for her life, should go to the Persons then entitled to his Personal Estate; and, if the Children of both his Daughters should die under 21, then that the Shares to which they were both entitled for their lives, should go over. Cross Limitations therefore are out of the question.

There are three ways in which the Gift "to such Person or Persons as shall then be entitled to my Personal Estate," may be considered, first, as a general intestacy, and then *Lucy's* Share will go to the Testator's Next of Kin at his death. Second, as a Gift to the Sons with reference to the Donation to them of that part of the Property which was given to them absolutely. Third, as amounting to a Gift to the Persons who would be the Next of Kin of the Testator, either "at his own [*470] death, or at the death and failure of Issue of *Lucy*."

We submit that it is a Gift to the Persons who would have been entitled to his Personal Estate at his death, if he had died Intestate. *Doe v. Lawson* (a); *Holloway v. Holloway* (b); *Doe v. Prigg* (c). The true construction of the Gift over, is either that it amounts to a declaration of Intestacy, or that it is a Disposition which amounts to the same as would take place on failure of a Disposition.

Mr. *Knight* and Mr. *Chandless* for the Defendant, *Edward Boscawen Frederick*:

To imply Cross Limitations in this Case, would be repugnant both to the Scheme and to the Language of the Will.

The most sensible construction that can be put upon the words: "to such Person or Persons as shall then be entitled to my Personal Estate," is that they mean such one of the Testator's Residuary Legatees as should be then living, or, such Person or Persons as should then be entitled to the residue of his Personal Estate, *ultra* the Share of *Lucy*. The word *then*, cannot be rejected. In *Holloway v. Holloway*, no adverb of time was used; and in *Doe v. Lawson*, the word *then*, was not used in the sense in which it is here. The Person who was to take under the Gift over, was to be ascertained at the time when the Property came into Possession. If the word *then*, is rejected, *Lucy* herself would be entitled to a Share under the Gift over. *Bird v. Wood* (d).

*Mr. *Treslove* for the Defendant, *Thomas Prescott*, the Per- [*471] sonal Representative of *Augusta Prescott*:

No cross Limitations are created by this Will. The words, "for their respective lives" and "respectively," which are words of severance, are used throughout the Will. The expression, "the Trust Money," means the Cap-

(a) 3 East, 278.

(b) 5 Ves. 399.

(c) 8 Barn. & Cress. 231.

(d) 2 Sim. & Stu. 400.

1832.—Frederick v. Turner.

ital of each Daughter's Share. Cross Limitations cannot be implied, unless the whole Fund is to go over at once. That is not so, here. It would be absurd to imply Cross Limitations in favour of the Grandchildren, when the Testator has not created them in favour of his own Children. He has not made Cross Gifts as to the Annuity; then why is it to be inferred that he meant to make them as to the residue?

Under the Gift over, the Next of Kin of the Testator at the time of his death, are entitled. *Doe v. Lawson*. The word *then* was used in that Case.

[The *Vice-Chancellor* :—It was not used as descriptive of the Person who was to take at a particular time. It was not annexed to the character of the Person who was to take; but to the Gift.]

The Decision in *Bird v. Wood* was founded on the particular expression, in that Case, that the Stock given to the Next of Kin, was to be considered as vested from the time of the Testatrix's death.

Mr. *Pepys* and Mr. *Hodgson*, for the Children of Mrs. *Prescott* :

We claim by virtue of an implied Gift. The Gift over contemplates an event that has not happened; for all the Children of the Testator's Daughters have not died *under 21. The Gift over is not to take effect, unless the Children of both Daughters die under 21. The Testator has used words which are useless. If the words "or both of them," were left out, his meaning would be clear.

If both *Lucy* and *Augusta* had had Children, none of them would have taken vested Interests, except on their attaining 21. The attaining of that age is annexed to the Gift. In *Skey v. Barnes (c)*, Sir *W. Grant*, M. R., says: "I have said that I thought the decision of *Scott v. Barge-man*, right in its result, though not for the reason assigned. There was no Gift to the Daughters, but in the direction to the Trustee to divide the Fund among them, at their respective Ages of 21 Years. The Age of 21 was, therefore, part of the description of the Legatees among whom the Division was to be made. On that principle, Lord *Rosslyn*, after consideration and looking into the Authorities, decided the Case of *Batesford v. Kebbell*." The words here used are sufficient to vest the whole in the Children of that Daughter, who alone had Children that attained 21. In *Roe v. Clayton (f)*, it was decided that there was no impediment to implying Cross Remainders between the Children of two distinct Families.

It would be plain that the Children of Mrs. *Prescott* have become entitled, in the events that have happened, to the whole Fund, if the words of the Gift over were transposed: they would then run thus: "But, if all

(e) 3 Mer. 335. 342.

(f) 6 East, 628.

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such Child or Children of both my said Daughters shall die under the age of 21 Years respectively, "then upon Trust that my [*473] said Executors shall pay the said Trust Money, and the Interest and Proceeds thereof, to such Person or Persons, &c." The words, "the said Trust Money," mean the whole of the Money that should have been invested. In questions of this nature, no effect has been given to the word "respectively." *Green v. Stephens (g)*.

If the construction which we have contended for is not the proper construction, then, under the words of the Gift over, Mrs. *Prescott's* Children, are entitled to a Share of the Funds, as a class of Persons then entitled to the Testator's Personal Estate.

The VICE-CHANCELLOR :

There is no pretence for implying Cross Limitations in this Case. The Testator, in the Clause in which he declares the Trusts and Limitation to which the Shares of his Daughters shall be subjected, endeavors, for the sake of brevity, to use words which shall apply, at once, to the Share of each Daughter ; and he uses the word "respectively," in order to discriminate between the two Daughters. The proper construction to be put upon the Clause, is that, if either of the Daughters should die without leaving any Children or Child who should attain 21, then the Share of that Daughter should go over ; and, if they both died without leaving any such Children or Child, then that the Share of both Daughters should go over.

With respect to the Gift over, we must put such a construction upon it, as will make the Will, throughout, "consistent with itself. [*474] The Testator clearly intended that the Persons who should take the Share of *Lucy*, if she died without leaving a Child who should attain 21, should be the same as those who would take the Annuity, which is, in the first instance, given to *Lucy*. Taking therefore the first and last Clauses together, it appears that the Testator intended that the character of the Takers was to be determined when the contingency happened ; that is to say, that they were to be the Persons who should then be entitled to his Personal Estate. But, in this Will, it is impossible to annex any clear meaning to the words : " Such Person or Persons as shall then be entitled to my Personal Estate : " for, when the event took place, he would have no Personal Estate, as it would all be distributed.

My opinion is that the Testator has not sufficiently described the character to be borne by the Persons who were to take the Annuity and *Lucy's* Share of his Residuary Estate, at the time when the Gift over was to take effect, and therefore that they must go as in the case of an Intestacy.

Declare that the Gift over is void for uncertainty.

(g) 17 Ves. 64. 78.

1832.—Ward v. Pomfret.

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*WARD v. POMFRET.

1832: 12th and 13th November.—*Tithes*.—*Evidence*.

In a Tithe Suit, by a Vicar, old Overseers' Accounts, mentioning that a Sum had been received, from the Vicar, in respect of a Modus, payable to him, are admissible for the Defendants.

THIS was a Suit for Small Tithes, by the Vicar of *Tenterden*, in *Kent*, against the Occupiers of Lands in the Parish. The Defendants alleged that a Modus was payable to the Vicar, in lieu of the Tithes claimed by him; and, in support of that allegation, they produced a Book containing the Accounts rendered, by the Overseers of the Parish, of the Sums received by them, in 1719, in respect of Poors' Rates, and in which there was an entry of a Sum received, from the Vicar, in respect of a Modus.

Mr. *Boteler* and Mr. *Wright*, for the Plaintiff, objected to the admissibility of the Document, on the ground that it did not show that any Rate was made, and because the Vicar was not a Party to it.

Sir *E. Sugden*, Mr. *Knight*, and Mr. *G. Richards*, for the Defendants, said the Book was a Public Document; that the Rate was proved by the Receipt; that an entry made by a Man-midwife, in his Books, of a Sum paid to him on a certain Day, for delivering a Woman of a Child, was evidence, indirectly, of the time of the Child's birth: *Higham v. Ridgway* (a): and an entry, in an Attorney's Books, of a Sum paid to him for preparing Recovery-deeds, was Evidence that the Recovery had been suffered, *Warren v. Grenville* (b): that, on the same principle, the entry in the Overseers' Accounts, was Evidence that a Modus was then existing which was recognized by the Parties.

[*476] *THE VICE CHANCELLOR:

The question is whether this Book is admissible; the effect of it is a different question. I think that it is admissible as an account of Money received by Persons professing to be authorized to receive it. Suppose the question had been whether, in 1719, there was a piece of Land, in the Parish, called *Ox Close*; and that an Entry was found, in this Book, of a certain Sum received in respect of *Ox Close*. That entry would be receivable to show that there was a Tenement of that name, in the Parish. The Book is now produced to show that there was, in 1719, such a species of Property belonging to the Vicar, as a Modus; and I think that it is receivable to show that, in 1719, there was a reputation in the Parish that a species of Property, bearing the description of a Modus, was payable to the Vicar.

(a) 10 East, 109.

(b) 2 Strange, 1129.

1832.—Ward v. Pomfret.

Plaintiff had subpoenaed the Defendants' Agent to produce, at the hearing, a Parish Book in his custody. Held that, as it was a Public Document, and in the possession of the Defendants' Agent, the Defendants were entitled to have it produced and read at the hearing, for their benefit.

THE Plaintiff wishing to have a Book, which was in the custody of the Defendants' Agent, produced, at the hearing, on his behalf, had served the Agent with a *Subpœna duces tecum*, for that purpose, and the Agent attended accordingly. The Defendants' Counsel required the Book to be produced in order that they might show that, in 1718, a Person, named *Turner*, was Vicar of the Parish. The Plaintiff's Counsel contended that no use ought to be made of the Book, by the Defendants, as it was the Plaintiff's Exhibit, who might use it or not, as he thought proper.

But the *Vice-Chancellor* ruled that the Book, being a Public Document, belonged neither to the Plaintiff, nor to the Defendant, and that, as it was produced by the Defendants' Agent, the Defendants [*477] were entitled to inspect it, and have the benefit of it.

The Defendants then tendered a Modus Receipt, signed by *Turner*, as Vicar, and dated in 1718, which, after some objection on behalf of the Plaintiff, was held to be receivable.

In a Tithe Suit by a Vicar, for Small Tithes, Depositions of deceased witnesses in an old Suit, by the Rector, for Great Tithes of the Parish, were received as Evidence.

THE Defendants next produced the Proceedings and Depositions in a Suit relating to the Great Tithes of the Parish, which was instituted in the Reign of Charles 2, by the then Rector, against the Occupiers. The Depositions mentioned that a Modus was payable, to the Vicar, for the Small Tithes of the Parish.

The Plaintiff's Counsel said that the Depositions were not receivable, as the Vicar was not a party to the Suit, and, therefore, it was *res inter alios acta*. The Defendants' Counsel said that the Depositions were admissible, as being Declarations by deceased Persons, who were wholly disinterested at the time. *Freeman v. Phillipps* (c).

THE VICE-CHANCELLOR :

It appears from what Lord *Ellenborough*, C. J. is reported to have said in the Case cited, that the Depositions produced in that case, were made by the Witnesses in a Cause in which the question then in discussion, was not the same as in the one tried. It seems to me that, according to the principle of that Decision, the Depositions produced in this Case, are admissible.

(c) 4 M. & S. 486

1832.—Attorney-General v. Haberdashers' Company.

[*478] *THE ATTORNEY-GENERAL v. THE HABERDASHERS' COMPANY.

1832: 15th November.—*Charity.*

The Defendants, and other Companies, were formerly obliged to keep a Stock of Corn, for the supply of the Market, and to sell it when the Lord Mayor directed, and he, on some occasions, fixed the price. In 1646, an Estate, was conveyed to Trustees in Trust to pay, out of the Rents, certain Annual Sums. One of the sums was to be paid, to the Defendants, for the increase of their Stock of Corn, for the service of the Market. Some of the other Sums were given for clearly charitable purposes. Held that the Gift to the Defendants, was not a Charity, and that, the Purpose of it having failed, they were entitled to apply it to their Corporate purposes.

By Lease and Release of the 17th and 21st of August 1646, *Henry Hazlefoot*, a Member of the Company, conveyed an Estate in *Essex*, which was then let for 70*l.* a year, to certain Persons, Members of the Court of Assistants of the Company, in Fee, upon Trust, yearly, for ever, to pay, employ and dispose of all the Rents, Fines, Issues and Profits thereof, as follows: To the Churchwardens of *St. Nicholas Cole Abbey*, in *London*, 8*l.*, to be divided amongst the Lecturer, Clerk and Sexton of the Parish as therein mentioned; 20*s.* a piece to 20 poor decayed Housekeepers free of the Company of Haberdashers; to *St. Thomas's* and three other Hospitals, four Sums amounting together to 20*l.*; to each of the four Prisons in *London*, 50*s.*, to be distributed, by the Master and Wardens of the Company, as therein mentioned: To the Master and Wardens of the Company, 8*l.* yearly, for increase of their Stock of Corn for the service of the Market in *London*: To the four Wardens, for their pains, 40*s.* yearly: To the Clerk of that Company, 20*s.* yearly; to the two Beadles, and the Porter of the Company, 6*s.* 8*d.* a piece, yearly: the rest and residue of the said Rents and Profits to be paid, yearly, to the said Master and Wardens, for the further increase of their Stock of Corn. Provided that, if the

[*479] Rents and Profits of the Estate should fall short, or could not be received to pay the yearly Sums aforesaid, then the payment thereof should be forborne and not be paid until such time as the Rents and Profits received should be able fully to satisfy the same; saving the 8*l.* yearly to *St. Nicholas Cole Abbey*, which was duly to be paid, notwithstanding such falling short.

About 60 years ago, the Estate was conveyed, by the then Trustees, to the Company upon the Trusts declared by the Release of 1646. The Estate was now of the Annual Value of 190*l.* The Company however had never increased the Payments to the Charities, but had applied the surplus Rents to their Corporate purposes, and as their own Property.

The Information alleged that the Rents had become much more than sufficient for the purposes mentioned in the Release, and that the Charities

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ought to be increased in proportion to the increased Rents: and it prayed that the Rents might be administered according to the intention of the Donor, or as near thereto as circumstances would admit, and that the *Master* might settle a scheme for the future application of the Rents, and, if necessary, that the Estate might be vested in Trustees for the benefit of the Charity.

The Company, by their Answer, denied that the whole Rents of the Estate were given for the charitable purposes mentioned in the Information, or any other charitable purposes, for that the Estate was given to them charged with certain specified Annual Payments, by way of Charity, amounting to 58*l.* only, and the remainder of the Rents was given for the absolute benefit of the Company, to be employed by them in [*480] the increase of their Stock of Corn, or otherwise, for their benefit, as they should think fit: that, in the year 1646, and for some time previously and subsequently thereto, it was the Custom, in the City of *London*, to provide against scarcity of Corn in the City, by requiring each of the Chartered Companies to keep in store, in their Granaries, a certain quantity of Corn, which was to be renewed from time to time, and, when required for that purpose, to be produced in the Market for Sale, at such times, and in such quantities, as the Lord Mayor or the Court of Common Council should direct: that such Custom was greatly burdensome, and occasioned great expense and loss to the Companies, for that, in times of scarcity, when Corn was of great price, Precepts were issued, by the Lord Mayor, to the Companies, requiring them, under Penalties, to provide in store certain quantities of Corn, not for any purpose of charitable distribution, but to supply the demand, by Sale in the Corn Market of the City: that upon some of such occasions, the market Price for the Corn to be Sold, was fixed by the Lord Mayor, without regard to the Price at which it had been purchased: that, for the purpose of complying with such Precepts, it was frequently necessary to exact large Money Contributions from the Companies, and from the Freemen and Members thereof, and, the better to answer such Exactions, it was the Custom of the Companies always to keep a large Store of Corn, which they sold, from time to time, when it was not likely to be required, by Precept, for the use of the Market; and they repurchased other quantities, for Store, in times of abundance, and thereby made Profits by the Sale and Purchase of Corn; and the Stock of Corn so kept and formed, was part of the Corporate Posses- [*481] sions, and was the Property of the Company; and the Profits made by such Dealings were added to the Corporate Funds: that such Dealings had long ceased, and the Funds appropriated to them, were applied to other purposes of the Company: that they had duly paid the Chari-

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table Payments charged upon the Estate: and they submitted that the Rents, after payment thereof of the Charitable Payments, were, and always had been applicable, in their hands, either for the Purchase or increase of their Stock of Corn, or for any other purpose which they might think fit.

The Defendants proved, by old Documents, the Statement, in their Answer, as to the mode in which it had been customary to provide against a scarcity of Corn in *London*.

Sir *E. Sugden*, and Mr. *Bethell*, for the Relator:

At the time when the Charity was founded, the Rents of the Estate amounted to 70*l.*, and the Payments amounted exactly to the same Sum; consequently, it is a general dedication of the Rents to Charity; and, as the Rents are increased, the Payments to the Charities must be increased. The keeping up of a Stock of Corn, was a burden to the Company, and a benefit to the Public. It was a Charity in the strict sense of the word; for no one can doubt that the object of the Donor, was that the Market should be well supplied with Corn, so as to enable the Poor to purchase it at a cheap rate. A Provision for building or repairing Bridges, or doing any other act for the public benefit, is a Charity. But, if the Residue was given, merely to re-

lieve the Company from a burden, still it is a Charity, within the [482] meaning of 43 Eliz. c. 4, and, though the purpose of the Gift has failed, the Court will direct the *Master* to settle a scheme for its Application. *Attorney-general v. Johnson (a)*; *Attorney-general v. Brown (b)*; *Attorney-general v. Corporation of Dublin (c)*; *Attorney-general v. Heelis (d)*; *Attorney-general v. Corporation of Carlisle (e)*; *Ex parte Jortin (f)*; *Attorney-general v. Oylunder (g)*.

Mr. *Knight* and Mr. *Roupell*, for the Defendants, were stopped by the Court.

The VICE-CHANCELLOR:

The Question is whether this Donation was made for relieving the Buyers of Corn generally, or whether it was not made for the purpose of lessening the burthen, under which the Company lay, of providing Corn, whenever the Lord Mayor might think right to direct them so to do, by his Precept. I think that the Donor had no Intention but to relieve the Company from the burthen. For, according to the account of the Custom given in the Answer, the Stores of Corn were to be provided and kept up by the several Chartered Companies of *London*. The Stock of Corn was provided by the Companies, not for the Purpose of its being sold at a cheaper Rate, but merely in order that there might be always, in the Market, a sufficient quantity of Corn to

(a) Amb. 190.

(d) 2 Sim. & Sta. 67.

(g) 3 Bro. C. C. 166.

(b) 1 Swanst. 265.

(e) *Ante*, Vol. II. p. 437.

(c) 1 Bligh, N. S. 312.

(f) 7 Ves. 340.

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meet the Demands of those who wanted to purchase it. For it is observable that the Answer states that the Corn was to be sold at such Times, and in such Quantities, but not at such *Prices*, as the Lord Mayor should direct.

[Mr. *Bethell* here mentioned that the Gift was expressed to be made, to the Company, for the *increase* of their Stock of Corn, and not to relieve them from the burden of complying with the Precept of the Lord Mayor; and that the Answer stated that, on some occasions, the Market Price of the Corn to be sold, was fixed, by the Lord Mayor, without regard to the Price at which it had been purchased for Store by the Companies.]

It comes to the same thing. On some occasions the Lord Mayor might fix the Price, on others, he might not. If I am to take the account of the Custom given in the Answer, as true, it is manifest that the Custom operated as a burden on the Company: and the Donor, when he made this Gift, intended to diminish that burden, and not that the Money should be applied for the purchase of Corn for the Benefit of the Public. Had he intended otherwise, he would have directed the Money to be applied in the Purchase of Corn for the service of the Market in *London*. He does not, however, use those words, but says: "For the increase of *their* Stock of Corn for the service of the Market in *London*, which, by the Custom, they were bound to keep. He therefore, evidently intended to mitigate the burthen, under which this Company lay, of providing Corn. Next but one to this Donation, there follows, in the Release, a Gift, to the two Beadles and the Porter of the Company, of 6s. 8d. a-piece, yearly. Now suppose that the Company, in after times, did not think proper to have more than one Beadle; it could not, surely, be said that there was a Donation of 6s. 8d. for the Benefit of the Public? All these Gifts must be taken in connection with each other; and as, by the Gift to the Beadles and [484] Porter, he mitigated the burthen of supporting the Establishment, so, by the Gift of the 8l. per Annum to the Company, he has mitigated the burthen, to which they were subject, of providing Corn for the service of the Market. This Gift, therefore, was intended, substantially, for the Benefit of the Company, though it was to be applied in a particular manner; and, if it cannot be so applied, then the Company may dispose of it as they may think proper.

The Donor then gives, the Rest and Residue of the Rents, to the Company, for the further Increase of their Stock of Corn. He, therefore, contemplated that there might, by possibility, be a Surplus of the Rents after the Payments which he had before directed, had been made; and, as he intended the previous Donation to the Company for the same purpose, to be for their Benefit, and not for the Benefit of the Public, he must have meant this latter Gift also to be for their Benefit.

1532.—Podmore v. Gunning.

My opinion, therefore, is that the object of this Information has totally failed, and that it must be dismissed, with Costs to be paid by the Relator.*

His *Honor*, after delivering his Judgment, said that the Defendants' Evidence must be entered as read; for that, when a Bill was dismissed after hearing the Plaintiff's Counsel only, the Defendant would not be entitled to the Costs of his evidence, unless it was entered as read.

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*PODMORE v. GUNNING.

1832: 25th June.—Trust.—Receiver.

Testator bequeathed the Residue of his Real and Personal Estate, to his Widow, her Heirs, Executors and Administrators: "having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my Property after her decease." The Testator's Widow died intestate. The Bill alleged that the Testator had bequeathed the Residue of his Property, to his Wife, on the faith of a Promise that she would dispose of his property in favour of the Plaintiffs, who were Natural Children of the Testator. The Court, on Motion supported by Affidavits verifying the Allegation, granted a Receiver of the Real Estates, against their Heir and second Husband of the Widow.

THE Bill stated that Sir *T. Staines*, deceased, was, at the time of making his Will, desirous of making some Provision for the Plaintiffs, *Mary* and *Margaret Thomasine Podmore*, (who were generally understood to be his Natural Daughters) and had determined to give to them, after the death of Lady *Staines*, his Wife, the Residue of his Property: that Sir *T. Staines* communicated his determination to his Wife, upon which she proposed that he should leave the Residue of his Property to her, and promised to carry his determination in favour of the Plaintiffs, into effect: that, upon the faith of such Promise, Sir *T. Staines* made his Will, dated the 5th day of July 1830, and in the following words: "I give to my Friend Sir *William Bolton*, his Executors, Administrators and Assigns, the Sum of 1,000*l.*, to be paid to him immediately after the decease of my dear Wife, *S. T. Staines*: and I give to Dr. *Daniel Jarvis*, his Executors, Administrators and Assigns, the like Sum of 1,000*l.*, as a proof of the high Esteem I entertain for him, to be paid to him immediately after the decease of my dear Wife: and, as to all the Rest, Residue and Remainder of my Estate, of every Nature and Kind, and all the Property I have, I give, devise and bequeath the same to my said dear Wife, her Heirs, Executors, Administrators and Assigns, for her own separate Use and Enjoyment, having a perfect

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* Affirmed by the Lord Chancellor. See 1 Mylne & Keen, 420.

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Confidence she will act up to those views which I have communicated to her in the ultimate disposal of my Property after her decease. And I do hereby appoint my dear Wife and Thomas Hodgkinson, Esq., Executrix and Executor of this my Will." The Bill further stated that Sir Thomas Staines died on the 13th of July 1830, and in September following, Lady Staines proved his Will: That, in April 1831, Lady Staines made her Will, which was in exact conformity with the aforesaid Desire, and Determination of Sir Thomas Staines in favour of the Plaintiffs, and was made for the purpose of carrying his views into effect, and that Lady Staines thereby disposed of all the Estate and Property of Sir Thomas Staines, which would remain after payment of his Legacies, to or for the benefit of the Plaintiffs: That, on the 24th of November 1831, Lady Staines intermarried with the Defendant George Gunning, and that, after the marriage, Gunning possessed himself of part of Sir T. Staines's Personal Estate: That Lady Staines died on the 25th of January 1832; that the Defendant Gunning had burnt or destroyed, or procured to be burnt or destroyed, her said Will and the Draft thereof; and that, after her death he took out Administration to her, and the Defendant Hodgkinson proved Sir Thomas Staines's Will. The Bill charged that a Sum of 4,898*l.* Three per Cents, belonging to the Testator's Estate, was then standing in Lady Staines's name, and that Gunning had possessed himself of the Wines, Furniture, and some other Articles, which belonged to the Testator at his death.

The Bill prayed that the Testator's Personal Estate might be duly administered, and the Residue ascertained and secured for the Benefit of the Plaintiffs; and that *Gunning might be restrained from [*487] selling the Stock, Wines, Furniture, &c., and for a Receiver of the Testator's outstanding Estate.

The Plaintiffs having moved for an Injunction and a Receiver, according to the Prayer of the Bill, it was arranged, between the Parties, that the Stock should be transferred into Court, and the Wines, Furniture, &c. sold, and the Proceeds secured.

The Plaintiffs then amended their Bill, by adding the Heirs both of Sir Thomas and Lady Staines as Parties, and by stating that, upon Sir Thomas Staines's decease, his Widow entered into the possession of his Real Estates, and that, after her death, Gunning, and the Defendants William Bridger and Charlotte his Wife, (the latter being the Sister and Heir of Lady Staines), entered into the possession of the same Estates. The amended Bill prayed that the Testator's Will might be established, and the Trusts performed, that an Account might be taken of his Personal Estate, and that the Plaintiffs might be declared to be entitled to the clear Residue thereof and also to the Testator's Real Estates, and that an Account might

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be taken of the Rents and Profits thereof become due since Lady *Staines's* death, and that the same might be paid, to the Plaintiffs, by the Defendants *Gunning* and Mr. and Mrs. *Bridger*, and that they might be ordered to convey the Real Estates to the Plaintiffs, and to deliver up to them the Title-deeds thereof, and that *Gunning* and Mr. and Mrs. *Bridger* might be restrained from receiving the Rents and Profits, and that a Receiver might be appointed thereof.

[*438] *The Plaintiffs now moved for a Receiver of the Rents and for an Injunction as prayed by the amended Bill.

The Motion was supported by the following and other Affidavits:

Dr. *Jarvis* deposed that he had been intimately acquainted with Sir *Thomas* and Lady *Staines*, for many years previous and up to the decease of Sir *Thomas*: that, in a conversation with Sir *Thomas*, at the time of making his Will first thereafter mentioned, Sir *Thomas* told the Deponent that he had two Natural Daughters, (meaning, as the Deponent believed, the Plaintiffs *Mary* and *Margaret T. Podmore*,) who were then women, and married two Brothers of the name of *Podmore*: That the Deponent did, at the request and agreeable to the instructions of Sir *Thomas Staines*, (who was then lying dangerously ill,) on the 30th of June 1830, prepare a Will for him, whereby he gave and devised the whole of his Estate, of every nature and kind, and all the Property he had, to his Wife, her Heirs, Executors, Administrators and Assigns, for her own separate use and enjoyment, and in which he stated his having a perfect confidence that she would act up to those views which he had communicated to her, as thereafter mentioned, in the ultimate disposal of his Property after her decease, and by which he appointed his Wife Executrix, and *Thomas Hodgkinson* Executor thereof: That, Sir *Thomas Staines* executed such Will, on the said 30th of June, in the presence of the Deponent and two other Persons whom he named: That, on the 30th of June, and previous to the execution of the said Will, Sir *Thomas Staines*, in the presence of Deponent, addressing himself to Lady *Staines*, said, "*My wish is that the*

[*489] *Podmores*," (meaning the Plaintiffs as the Deponent believed,) "*shall have my Property after your death, provided, upon inquiry, you find they are respectable.*" To which she answered, "*You may depend upon me.*" That Sir *Thomas Staines*, on the 5th of July 1830, in a conversation with the Deponent, expressed himself dissatisfied with his Will because he had not made any Bequest to Sir *William Bolton*, an old and intimate Friend, and also to Deponent, and, therefore, desired Deponent to burn the same, which the Deponent did in Sir *Thomas's* presence: that, on the same 5th of July, the Deponent, at the request and agreeable

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to the instructions of Sir *Thomas Staines*, prepared another Will, the substance of which the Deponent set forth, and which was the same as that stated in the Bill. The Deponent further stated that, on the 5th of July, and previous to the Execution of the last mentioned Will, Sir *Thomas Staines*, in his presence, repeated to Lady *Staines*, his intention and wishes as to the ultimate disposal of his Property, in the same Language as on the occasion of his executing his Will of the 30th of June 1830, or to the same effect; and that Lady *Staines* then undertook and promised Sir *Thomas*, that she would fulfil his intentions of giving the Residue of his Property, after Payment of the Legacies, to the Plaintiffs: That the Deponent made an entry, in his Pocket Book, of the Conversation which passed between Sir *Thomas* and Lady *Staines* (a Copy of which he set forth in his Affidavit, and which was to the same effect as he had before deposed to): That, on the 24th of July 1830, Lady *Staines* requested Deponent to prepare her Will, at the same time expressing her desire to give 1,200*l.* in Legacies to three Persons whom she named, and to give all the remainder of Sir *Thomas Staines's* Property *to the Plain- [*490] tiffs, so as to carry the wishes and intentions expressed by him, as before mentioned, into effect: That the Deponent did, accordingly, prepare Lady *Staines's* Will, of which he set forth a Copy, in his Affidavit, from a Draft in his Possession. It commenced by giving the Legacies, and then proceeded thus: "I give, devise and bequeath all the rest, residue and remainder of my Estate, both Real and Personal, to my late Husband's two Natural Daughters, *Mary* and *Margaret Podmore*, the present Wives of Mr. *Arthur* and Mr. *George Podmore*, as Tenants in Common, and not as Joint Tenants."

The Plaintiffs *George* and *Arthur Podmore*, made an Affidavit stating that, in March 1832, they asked Mr. *Hodgkinson* whether he could give them any Explanation as to that part of Sir *Thomas Staines's* Will, which related to the future disposition of his Property after Lady *Staines's* Death; that *Hodgkinson* was unable to do so, but informed them that Lady *Staines* had made a Will, shortly after Sir *Thomas's* Death, which was prepared by Dr. *Jarvis*, and, wishing to have her Will more formally made, she got one prepared by her Solicitor, but which Will *Hodgkinson* had been informed that *Gunning* had destroyed: that, in April 1832, the Solicitor admitted to A. *Podmore*, that he had prepared a Will, which Lady *Staines* had executed, but that it was afterwards destroyed by *Gunning*, and, on A. *Podmore* asking for a Copy of the Draft of the Will, the Solicitor stated that he had destroyed it, with the consent of the Parties, (but without naming who they were,) and added that Lady *Staines* had left the Deponents Legacies (but did not state their Amount).

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[*491] *The following and other Affidavits were made in opposition to the Motion :

Gunning deposed that he had frequent Conversations with *Lady Staines*, as to the Property bequeathed to her by her former Husband, but that she never informed him that it was bequeathed to her, subject to any Injunction, Command, or Direction, from her former Husband, as to the ultimate Disposal of the Residue thereof, after her Decease, to the Plaintiffs ; but, on the contrary, that she frequently told Deponent, that it was at her own absolute Disposal, and that, on the 9th of November 1831, previous to her Marriage with the Deponent, she executed her Will, whereby she gave the whole of her Property to him absolutely.

Lady Staines's Solicitor deposed that, during the year 1831, he had frequent Conversations with her respecting the Property which had been bequeathed to her by the Will of her late Husband, *Sir Thomas Staines* : that she invariably stated her conviction that the whole of such Property was given to her, by his Will, for her own Use and Benefit, absolutely, and without any Condition, Limitation or Control whatever, and that the Words contained in such Will : “ Having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my Property after her Decease,” related to, and were intended solely to impress on her mind the great objection entertained by *Sir Thomas Staines*, that any part of his Property should, after her Decease, be given to the Family of the *Bridgers*, who were the nearest Relations of *Lady Staines* :

[*492] that, in August 1831, he prepared a Will for **Lady Staines*, according to the Instructions he had received from her, and which Will was duly executed by her on the 5th of August 1831 : that, by the said Will, *Lady Staines* gave and bequeathed, amongst various other Legacies, the sum 500*l.* to each of the Plaintiffs *Mary* and *Margaret T. Podmore*, expressly stating to the Deponent that she did so voluntarily, and out of respect to her late Husband's memory, as she had reason to believe that they were his Natural Daughters, though she had no positive information on the subject, and that she often repeated, to the Deponent, that she had not received any Injunction, from *Sir Thomas Staines*, so to do : That the said Will of the 5th of August 1831, was revoked by a subsequent Will, executed, by *Lady Staines*, on the 9th of November 1831, whereby she bequeathed the whole of her Property to the Defendant *Gunning* : That the last-mentioned Will was afterwards revoked by the subsequent Marriage of *Lady Staines* to the Defendant *Gunning*.

A Motion was now made, on behalf of the Plaintiffs, for a Receiver of the Rents of the Testator's Real Estates, and for an Injunction to restrain *Gunning* and Mr. and Mrs. *Bridger* from receiving them.

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Mr. *Pepys* and Mr. *Turner*, in support of the Motion, said that it appeared, by *Jarvis's* Affidavit, that Lady *Staines* had promised her Husband, before he made both his First and his Second Will, that she would fulfil his intentions with respect to the Plaintiffs: that, in pursuance of that Promise, she made her Will within a few days after the Testator's Death: that it was quite clear that he was not particularly anxious not to disclose *the connexion which existed between him and the Plaintiffs; [*493] and that it was, on that account, that their Names were not mentioned in the Will.

The following Cases were cited in support of the Application: *Thynn v. Thynn* (a); *Oldham v. Litchford* (b); *Devenish v. Baines* (c); *Reech v. Kennigate* (d); *Drakeford v. Wilks* (e); *Stickland v. Aldridge* (f); *Chamberlain v. Agar* (g).

Mr. *Knight* and Mr. *Duckworth*, for the Defendants, said that the Testator did not desire his Wife to dispose of any part of his Property, after her decease, for the Benefit of the Plaintiffs, unless, upon inquiry, she should find them respectable; so that he trusted not only to her Integrity, but to her Discretion: that if the Court were, ultimately, to grant, to the Plaintiffs, the Relief which they asked, Lady *Staines* would be made merely Tenant for, Life, and the Court would make a disposition of the Testator's Property, which he himself declined to make: that the Cases which had been cited, related to Personal Estate only; and there was no Case in which the Doctrine applied, by the Court, to Personalty, in Cases of Fraud, had been extended to Real Estate: that *Oldham v. Litchford* was a direct Decision to that effect; for it appeared, by the Editor's Note to that Case, that the Decree so far as it affected the Real Estate, was discharged on the Rehearing: that the words of the 7th Section of the Statute of Frauds, most imperatively required that all Declarations of Trust *should be in [*494] Writing; and, if a Breach of Promise similar to that stated in the present Case, were made equivalent to a Breach of Trust, there would be an end of the Statute: that it was clear that the Testator intended to leave it to his Wife's Discretion, to spend as much of his Property as she pleased, and that, therefore, there was no Trust which this Court could execute; that *Stickland v. Aldridge* was not a Decision, but merely a Direction that a Plea should stand for an Answer, with liberty to Except: that that Case related to the Mortmain Act; and having regard to the strong Language of that Act, it would be monstrous to hold that a Party could, on his Death-bed, make a Parole Disposition for a Charitable Purpose; that, in the Case put

(a) 1 Vern. 296.

(d) Amb. 67. S.C. 1 Vez. 123.

(g) 2 V. & B. 259.

(b) 2 Vern. 506.

(e) 3 Ark. 539.

(c) Prec. Cha. 3.

(f) 9 Vez. 516.

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by Lord *Eldon*, in his Judgment in *Strickland v. Aldridge*, of a Father devising his Estate, to his youngest Son, under a Promise that the latter would pay 10,000*l.* to the eldest Son, his Lordship did not say that the Deviser would be a Trustee of the Real Estate, to the extent of 10,000*l.*, or that that Sum would be a charge on the Real Estate. *Lord Irnham v. Child* (h); *Meredith v. Heneage* (i); *Sale v. Moore* (k); *Wilson v. Major* (l); *Bradly v. Westcott* (m); *Ross v. Ross* (n); *Bull v. Kingston* (o); *Pushman v. Filliter* (p).

The VICE CHANCELLOR:

I cannot but think that if, at the hearing of the Cause, the Facts should appear as they do upon the present Affidavits, the Court would give Relief.

I have always understood that the Court would interfere to prevent [*495] the obtaining of an Estate by Fraud, notwithstanding the Statute of Frauds. A variety of Cases might be put. Suppose a Man deposes an Attorney to buy an Estate for him, and the Attorney purchases that Estate for himself, the Court would interpose notwithstanding the Statute of Frauds. It is clear to me, from the language which Lord *Eldon* uses in the Case of *Strickland v. Aldridge*, that he did consider that this Court would interfere, for the purpose of giving effect to the Mortmain Act, upon the same principle that it would give its assistance for the purpose of preventing Fraud as between private Individuals. His Lordship says: "The Statute was never permitted to be a cover for Fraud upon the private Rights of Individuals; and, though within the intention it cannot be said a Trust is declared under these circumstances, it is clear a Trust would be created upon the principle on which this Court acts as to Fraud."

Then his argument is this; that, as this Court would, notwithstanding the Statute of Frauds, relieve in a Case where a Trust would be created, upon the principle of this Court which denies to all Persons any advantage obtained by Fraud; so, if it turns out that the Fraud attempted to be practised, was a Fraud upon the Rights of Parties arising out of the Statute of Mortmain, this Court will also relieve.

The principle upon which *Muckleston v. Brown* (q), as well as *Strickland v. Aldridge*, proceeded, shows that, notwithstanding the Statute of Frauds, this Court will interpose to prevent a Party from being deprived of his Rights, by means of Fraud.

[*496] "If that be so, the Question is whether there is not, as this Case now stands, sufficient Ground for the Interference of the Court. Now, supposing that those Words were omitted out of the Case

(h) 1 Bro. C. C. 92.

(i) 11 Ves. 205.

(o) 1 Mer. 314.

(i) *Ante*, Vol. I. p. 542.

(m) 13 Ves. 445.

(p) 3 Ves. 7.

(k) *Ibid.* 534.

(n) 1 Jac. & Walk. 154.

(q) 6 Ves. 52.

1834.—Anonymous.

which Dr. *Jarvis* represents as forming part of the Conversation, namely: "Provided you find them respectable:" then there would be, clearly and expressly, a Promise, on the part of Lady *Staines*, to convey, after her Death, what her Husband gave to her, to his two Natural Daughters. The Right of the Persons to take, is not, I think, materially affected by the introduction of those Words; because we must compare what Dr. *Jarvis* says with regard to them, with what he states, in the written Memorandum, to have taken place between Sir *Thomas* and Lady *Staines*. He there says: "She has the whole of his Property, with an understanding that, at her Death, subject to the two Legacies (she consented with great readiness) to leave the whole of his Property to his two Natural Children." Then the two Natural Children are named. I cannot, therefore, but think that the Promise must be taken to be, in substance, as it is represented in the written Memorandum, and that it is not affected by those Words, "If you find them respectable." Supposing, however, those Words to have been actually used, and to have formed part of the Promise; it is not represented, upon these Affidavits, that Lady *Staines* did not find the Parties respectable; and, if they are not stated not to be respectable, they must be taken to be respectable.

In that respect the Case is clear enough: and it does not appear to me to be materially altered or embarrassed by the Circumstance that the Will which Lady *Staines* made, did not give the [*497] whole of the Property to the Plaintiffs, but made an Exception in favour of certain Legatees. Probably she understood the Promise in a loose way. It may reasonably be supposed that neither this Lady, nor Dr. *Jarvis*, nor any other Person unacquainted with the Doctrines of this Court, would understand the Words as so strictly creating a Trust in favour of the two Daughters, as that there should be no Exception in the shape of Legacies to other Persons. But, in whatever way the Words may have been understood, the Promise, which is a Matter of Fact, cannot be affected by it: and I cannot but think that this is a Case in which there ought to be a Receiver.

Motion granted.

ANONYMOUS.

1834: 6th August.—*Practice*.

Course of Proceeding to be followed by a Defendant, where the Plaintiff, after serving a Sub-pœna to Rejoin, does not proceed with the Cause.

On a Motion to Dismiss for want of Prosecution after service of a Sub-Vol. V.

1834.—Hutchinson v. Stephens and Others.

pœna to Rejoin, made by Mr. *Wakefield*, and opposed by Mr. *K. Parker*, the *Vice-Chancellor* said that he had a Certificate of the Practice in such Cases, which had been delivered, by Mr. *Jackson*, the Clerk in Court, to Sir *John Leach*, V. C., in Feb. 1820, and which was as follows :

“ If the Plaintiff has served a Subpœna to Rejoin, which he will do to prevent the Defendant moving to dismiss, the Defendant is, from that time, precluded from moving to dismiss the Plaintiff’s Bill for want of Prosecution. The Defendant must then wait one clear Term after the [*498] Subpœna to Rejoin was served (1st **Dickens*, 84), when he must give Rules to produce Witnesses: he must then wait another clear Term, when he must give Rules to publish Depositions, although not any Witnesses have been examined. This is compulsory Process. The Defendant must then wait another clear Term, when he, the Defendant, may set the Cause down to be heard at his request, and must serve the Plaintiff with a Subpœna to hear Judgment.”

Mr. *Wakefield* cited *Skip v. Warner* (a) ; *Fell v. Morris* (b) ; *Squirrell v. Squirrell* (c) : but his Motion was refused with Costs ; as was also a similar Motion, in *Booth v. Smith*, which was supported by Mr. *B. Anderson*, and opposed by Mr. *Whitmarsh*.

HUTCHINSON v. STEPHENS AND OTHERS*

1834 : 6th August—*Trustee*,—11 *Geo. 4*, and 1 *Will. 4*, c. 60.

A. and *B.* claimed, adversely, a Sum of Stock standing in the Names of *A.* and two other Persons, as Trustees : *A.* filed an Amicable Bill, to have the Rights and Interests of himself and *B.* declared : *A.* was beyond Sea, commanding a Merchant Vessel, on a Voyage to *India*. *B.* presented a Petition, under 11 *Geo. 4*, and 1 *Will. 4*, c. 60, praying that the Stock might be transferred into Court, in the Cause. Petition refused, the Case not being within the Act.

THE Plaintiff and the Defendants, *Charles* and *William Stephens*, were Trustees of two Sums of Stock standing in their Names, to which the Plaintiff and the other Defendants, who were his Infant Children set up conflicting Claims. This was an Amicable Suit, to have the Rights and [*499] Interests, of the Plaintiff and his Children, in the Trust Funds ascertained and declared. The Infants being desirous that the Funds might be secured pending the Suit, presented a Petition stating to that effect, and that *Charles* and *William Stephens* were willing to concur

* *Ex relatione*.

(a) 3 *Atk.* 558.

(b) 1 *Cox*, 176.

(c) 3 *Swanst.* 250, note. See *Tozer v. Tozer*, 1 *Cox*, 288.

1834.—Ex parte Dover.

in transferring the Funds into Court, and that the Plaintiff, the other Trustee, was absent beyond Sea, commanding a Merchant Vessel on an *East India* Voyage: but the Petitioners were informed and believed that he would not be disposed to make any Objection to the proposed Transfer. The Petition, therefore, prayed that *Charles* and *William Stephens* might be ordered, as Trustees as aforesaid, and that they or one of them might be ordered, in the place of the Plaintiff, to join in transferring the said Funds into the name of the Accountant-General, in Trust in this Cause.

Mr. *Longley*, for the Petitioners, said that this was an Application under 11 Geo. 4, and 1 Will. 4, c. 60, and that the 15th Section of the Act would authorize the Order, notwithstanding the absent Trustee's beneficial Interest.

The *Vice-Chancellor* refused to make the Order, saying that he did not consider the Plaintiff to be out of the Jurisdiction of the Court, and that he thought that Case was not within the meaning of the Act, but that, when the Plaintiff returned to England, he might join, with the other Trustees, in transferring the Stock as desired.

*EX PARTE DOVER.

[*500]

1834: 17th July and 27th Nov.—*Trustee*.—11 Geo. 4, and 1 Will. 4, c. 60.

Testator gave an Annuity to his Widow, and the Residue of his Estate to his Children. The Executors paid the Testator's Debts and Legacies, and purchased Stock, in their Names, to answer the Annuity, and paid the Dividends to the Widow. One of the Executors went to reside Abroad, and the other died: Held that they were Trustees of the Stock within 11 Geo. 4, and 1 Will. 4, c. 60.

ROBERT DOVER, by his Will, gave, all his Real and Personal Estates, to *Joseph Talbot* and *Henry Dover*, upon Trust, as soon as conveniently might be, to sell and dispose of the same for the general Benefit of his Children; and he gave to his Wife, an Annuity of 250*l.* for her Life, payable half yearly, and all the Residue of his Estate, to his Children living at his Death, absolutely; and he appointed *Talbot* and *Henry Dover* his Executors. The Testator died in June 1816. The Executors, as appeared by their Accounts which had been passed at the Stamp Office, had long since paid the Testator's Debts and Legacies, and they, out of his Personal Estate, purchased 8,333*l.* 6*s.* 8*d.* Three per Cent. Annuities, in their joint Names, as a Fund for payment of the Annuity; and that Stock was still standing in their Names; and they divided the Residue of the Testator's Estate amongst his Children. In 1830 *Talbot* emigrated to and settled in *America*. *Henry*

 1834.—Ex parte Dover.

Dover died in June 1834. Down to January 1834, the Dividends of the Stock had been duly paid, to Mrs. *Dover*, in satisfaction of her Annuity : but, owing to *Talbot* having gone Abroad, she was unable to receive the Dividends that became due in July following ; and, accordingly, she and the Testator's Children presented a Petition under 11 Geo. 4 and 1 Will. 4, c. 60, praying that the *Master* might inquire whether *Talbot* was a Trustee of the Stock and the unreceived Dividend thereof, within the Act, [*501] and that a new Trustee might be appointed in his place, and that the Stock might be transferred to the new Trustee, and that the Dividend then accrued due might be paid to Mrs. *Dover*.

Mr. *Cooke*, for the Petitioners, submitted that, upon the Facts above stated being substantiated, *Talbot* and *Dover* must be held to have relinquished all control over the Stock as Executors, and assumed the character of Trustees with respect to it : but that, at all events, Mrs. *Dover* must be entitled to be paid the accrued Dividend.

The *Vice-Chancellor* said that the precise Circumstances under which the Stock had been transferred into, and still remained in the Names of *Talbot* and *Dover*, ought to be inquired into, in order that it might be ascertained whether they had the Capital as Trustees : and, accordingly, his *Honor* made the usual reference to the *Master*, with a Direction to inquire under what Circumstances the Stock was originally invested and then remained in the Names of *Talbot* and *Dover*, with liberty to state special Circumstances.

The *Master* made a Report finding the Facts above stated, and that *Talbot* was a Trustee of the Stock within the Act, and particularly within the 10th and 22d Sections thereof, for the Persons and Purposes mentioned in the Will ; and that it was uncertain whether *Talbot* was living or dead.

Upon hearing Mr. *Cooke* in support of a Petition presented by the Widow and Children, praying that the *Master's* Report might be confirmed, and that the proper *Officer of the Bank of England might be ordered to transfer the Stock to the new Trustee and to pay the accrued Dividend to the Widow,

The *Vice-Chancellor* made an Order as prayed (a).

(a) See *Ex parte Merry*, 1 Myl. & Keen. 677.

1834.—Waterton v. Croft.

WATERTON v. CROFT.

CROFT v. WATERTON.

1834: 24th and 28th November.—Practice.—Subpœna.—Cause and Cross Cause.

In a Case of Cause and Cross Cause, where the Plaintiff in the former is Abroad or cannot be found, the proper course is to stay the Proceedings in that Suit, until the Plaintiff has answered the Cross Bill, and not to order the subpœna to answer the Cross Bill to be served on his Clerk in Court in the original Cause.

A DECREE has been made, in a Cause of *Croft v. Baring*, establishing the Will of *Christopher Waterton*, and decreeing that the Trusts thereof should be carried into Execution, and an Estate, called *Woodlands*, sold. The Bill in *Waterton v. Croft*, was filed by the Plaintiff *Robert Waterton*, who was the eldest Son and Heir of the Testator, and was then in the *West Indies*, for the purpose of establishing that his Father had died intestate with respect to the Estate directed to be sold, and to have it declared that the Decree in *Croft v. Baring* did not Bind his Rights in that Estate. The Bill in *Croft v. Baring* was then filed: it was a Bill of Revivor and Supplement, for the purpose of prosecuting the Decree in *Croft v. Baring*. An Order had been obtained, by the Plaintiffs in *Croft v. Waterton*, that Service of the Subpœna to appear to and answer the Bill in that Cause, upon *Robert Waterton's* Clerk in Court in the Cause of *Waterton v. Croft*, might be deemed good Service. *Robert Waterton* now moved to discharge that Order for Irregularity.

*Mr. Knight and Mr. Wigram, for the Motion, cited *Roberts* [*503] v. *Worsley* (a), *Bond v. The Duke of Newcastle* (b), *Smith v. The Hibernian Mining Company* (c), and *Rickcord v. Nedriff* (d); and said that this Case was different from a Defendant at Law instituting a Suit in this Court for the purpose of his defence at Law: that, in such a Case, the Court would order Service of the Subpœna upon the Plaintiff's Attorney at Law, to be deemed good Service; but there was no Authority to show that, when a Plaintiff has filed his Bill, his Clerk in Court is, thenceforth, to be taken as having Authority to appear for him in all Suits that may be instituted against him: that, if such were the case, nothing would be easier than to bring a Party into Contempt for Non-appearance; as he might not know that any Subpœna had issued against him: that this Court had no power to appoint an Agent for any man; but, if it found one already appointed, it would treat him as such, but only within the Limits which had been assigned him, as in the Case before referred to of a Bill to restrain

(a) 2 Cox, 389.
(d) 2 Mer. 458.

(b) 3 Bro. C. C. 385.

(c) 1 Sch. & Lefr. 238.

1834.—*Waterton v. Croft*.

Proceedings at Law : that here Mr. *Waterton* had a Clerk in Court to prosecute the Suit of *Waterton v. Croft*, but *non constat* that he would appoint him in any other Suit.

Sir *E. Sugden* and Mr. *Barber contra*, relied on *Gardiner v. Mason*, and *Mason v. Gardiner (c)*, and said that, though the Authorities on the subject were conflicting, the course of proceeding followed in that Case, was founded in Justice, and ought to be adopted.

[*504] *Mr. *Knight*, in reply, said that this was not a Case of Cause and Cross Cause, as *Mason v. Gardiner* was.

The VICE-CHANCELLOR :

I take this to be a Case of Cause and Cross Cause.

A Decree having been pronounced in the Cause of *Croft v. Baring*, by which Mr. *Waterton's* rights were affected, he filed the Bill in *Waterton v. Croft*, the object of which was, to get rid of that Decree. Upon this the Supplemental Bill in *Croft v. Waterton* was filed, for the purpose of obviating the attack which was so made, by the Suit of *Waterton v. Croft*, upon the Decree in *Croft v. Baring*. It appears that Mr. *Waterton* was out of the Jurisdiction when his Bill was filed ; but, for the purpose of defence to his Suit, it was necessary that an Answer should be put in to the Supplemental Bill ; and the Order which ought to have been made, was that the Proceedings in *Waterton v. Croft* should be stayed, until Mr. *Waterton* had answered the Bill in the Supplemental Suit of *Croft v. Waterton* ; but it was not proper to order that Service of the Subpœna upon Mr. *Waterton's* Clerk in Court in *Waterton v. Croft*, should be deemed good Service upon him in the Supplemental Suit. The Order was consequently irregular, and must be discharged with Costs.

The Registrar having suggested, to the *Vice-Chancellor*, that, according to the practice in Cases of Cause and Cross Cause, the Order was regular, his *Honor* directed the Registrar to search for Precedents.

[*505] *On this day, the Registrar delivered the following Certificate to the *Vice-Chancellor* :

Registrar's Office, 28 November 1834.

Vernon v. Moore, et ð contra.

23 January 1755, Ld. C. ; B. 1754, fol. 126.

Upon opening, &c. that the Plaintiffs in the original Cause, in Easter

(c) 4 Bro. C. C. 478.

 1834.—Waterton v. Croft.

Term 1753, exhibited their Bill in this Court against the Defendants there-
to, to be &c. to which they appeared and put in their Answers, which were
replied to. That, in Trinity Term last, the Plaintiffs in the Cross Cause,
exhibited their Bill against the Plaintiffs in the original Cause, to be, &c.
and all except *Mary Bray* had put in their Answers thereto: that the said
Mary Bray could not be found to be served with a Subpœna, and the Plain-
tiffs in the original Cause, are proceeding in their Cause, and the Plaintiffs
in the Cross Cause cannot proceed in their Cause, for the reason aforesaid.
It was therefore prayed, &c. Upon hearing Mr. *Capper* of Counsel for all
the Plaintiffs in the original Cause except the said *Mary Bray*, and an Affi-
davit of *Thomas Ward* read: It is ordered that Service of a Subpœna for
the said *Mary Bray* to appear to and answer the said Cross Bill, on the Clerk
in Court for the Plaintiffs in the original Cause, be deemed good Service on
the said *Mary Bray*.

Anderson v. Lewis, et à contra.

Hil. 1792.

It was Ordered that the passing of Publication in the original
Cause, should be stayed until a fortnight after *the Plaintiffs [*506]
thereto should have put in their Answer to the Plaintiff's Bill in
the Cross Cause.

N. B.—It does not appear from the Books that the Motion was for sub-
stituted Service of the Subpœna; but this is explained in *Brown*, vol. iii.
fol. 429.

Gardner v. Mason, et à contra.

13th December 1793, A. fol. 50.

Although it seems, from 4 *Brown*, fol. 478, that the Motion was for sub-
stituted Service, and that the *Lord Chancellor* thought such Service on the
Clerk in Court must be good, yet, in the Registrar's Book, the Motion is
only that the Proceedings in the First Cause might be stayed, until the
Plaintiff in that Cause had entered his Appearance in the Cross Cause, and
the Order was that the Plaintiff in the First Cause, should be restrained
from giving Rules to pass Publication in that Cause, until he should have
appeared in the Second Cause.

On the authority of *Vernon v. Moore*, (above) and of *Gardner v. Ma-
son*, (as reported by *Brown*), and, in the absence of any known Case

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where the Application had, since the latter, been refused, or, being granted, the Order had been discharged, an opinion had prevailed, in the Registrar's Office, that the Service of the Subpœna, in Cause and Cross Cause, on the Clerk in Court of the Plaintiff in the original Cause, would, upon an Order being obtained for that purpose, be regular, but, upon looking into their Books, and consulting with the Clerks in Court, (who consider [*507] the Practice to have been settled *in the above Case of *Anderson v. Lewis*), the Registrars are of opinion that such a Proceeding is not regular.

His *Honor* said that, in *Vernon v. Moore*, an Order had been made, in 1755, that service of the Subpœna in the Cross Cause, upon the Clerk in Court of one of the Plaintiffs in the original Cause, should be deemed good Service; but, in *Anderson v. Lewis*, in 1792, the proceedings in the original Cause were stayed until a fortnight after the Plaintiffs should have answered the Cross Bill: and that, in *Gardner v. Mason*, the Order made was not for substituted Service, but for stay of the Proceedings in the original Cause; and, consequently, that Case was misreported by Brown. His *Honor* added that the Registrars and all the Clerks in Court were of opinion that the proper course was not to make an Order for substituted Service, but for stay of the Proceedings in the original Cause.

Motion granted.

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*PARKER v. LLOYD.

1834: 13th December.—*Practice*.—*Subpœna*.

Motion for leave to serve a Subpœna on a Defendant resident in *Scotland*, granted.

THIS Suit related to Stock in the Funds. One of the Defendants resided at *Edinburgh*, and another at *Naples*.

Mr. *Cooper*, for the Plaintiff, now moved, under 4 & 5 Will. [*509] 4, c. 82 (a), for leave to serve those *Defendants with Subpœnas to appear and answer, and that the British Consul at *Naples*,

(a) By 2 & 3 Will. 4, c. 33, s. 1, it is enacted that it shall be lawful for the Courts of Chancery and of Exchequer in *England*, if they shall so think fit, upon special Motion of the Complainant or Complainants in any Suit which has been or shall be instituted in such Courts respectively, concerning Lands or Tenements, or Hereditaments situate in *England* or *Wales*, to order that service in any Part of the United Kingdom, and in the *Isle of Man* respectively, of any Subpœna, Letter Missive, and of all subsequent Process to be had thereon, upon any De-

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might be directed to serve the Subpœna upon the Defendant who was resident there.

*The VICE-CHANCELLOR :

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The Act does not specify any Person by whom the Subpœna is to be served ; and, therefore, any one may serve it. It is for the purpose of facilitating the authentication of the Service, that the Act requires it to be stated whether there is any Civil or Military Officer resident at the Place.

Mr. Cooper, afterwards, said that he would not take the Order for Service of the Subpœna at *Naples*, as he had not got an Affidavit that the Defendant was resident there : but that he had got the proper Affidavit as to the other Defendant, and, therefore, he would, with His *Honor's* permission, take the Order as to that Defendant, in the terms of the Order in

defendant in such Suit then residing in such Part of the United Kingdom or *Isle of Man* in which he, she, or they shall be so served, shall be deemed good Service of, or be made upon such Defendant upon such Terms, and in such Manner, and at such Time as to such Courts shall seem reasonable ; and that it shall be lawful for such Courts to proceed upon such Service as fully and effectually as if the same had been made within the Jurisdictions of such Courts respectively. Sect. 2 enacts that, along with the Subpœna, a Copy of the Prayer of the Bill shall be served : Provided that no Process of Contempt shall be entered upon such Proceedings as thereinbefore mentioned, nor any Decree made absolute, without the special Order of the Court, upon special Motion made for such Purpose.

The 4 & 5 Will. 4, c. 82, extends the Provisions, of the former Act, relating to Suits instituted concerning Lands, Tenements, or Hereditaments, to all Suits instituted, in the said Courts, concerning any Charge, Lien, Judgment, or Incumbrance thereon, or concerning any Money vested in any Government or other Public Stock, or Public Shares in Public Companies or Concerns, or concerning the Dividends or Produce thereof ; and to any Defendant in any such Suit as before mentioned, who shall appear, by Affidavit, to be resident in any Place, specifying the same, out of the United Kingdom ; and enacts that it shall be lawful for the said Courts, on Motion in open Court, of any of the Complainants, founded upon Affidavit and such other Documents as may be applicable for the purpose of ascertaining the Residence of the Party and the Particulars material to identify him and his Residence, and also specifying the Means whereby such Service may be authenticated, and especially whether there are any British Officers, Civil or Military, appointed by or serving under His Majesty, residing at or near such Place, to order that service of a Subpœna to appear and answer upon the Party, in the manner thereby directed, or in case where the said Courts shall deem fit, upon the Receiver, Steward, or other Person receiving or remitting the Rents of the Lands or Premises, if any, in the Suit mentioned, returnable at such Time as the said Courts shall direct, shall be deemed good Service of such Party, and afterwards upon an Affidavit of such Service had, to order an Appearance to be entered for such Party in such Manner, and at such Time as the said Courts shall direct, and that thereupon it shall be lawful for such Courts to proceed upon such Service, as effectually as if the same had been made within the Jurisdiction of such Courts.

The 2d Sect. provides that where the Defendant cannot be found, and there is just ground for believing that he secretes or withdraws himself so as to avoid being served with the Process of the Court, it shall be lawful for the Court to order that the service of the Subpœna shall be substituted in such manner as the Court shall direct.

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M Master v. Lomax (b). Motion granted as to the Defendant who resided in *Edinburgh*.

(b) That Order was as follows: "This Court doth order that Service, within a Month from this Day, of the Subpœna to appear to and answer the Plaintiff's Bill, in *Scotland*, together with a Copy of the Prayer of the Bill in this Cause, upon the Defendants, *A. Stewart*, and *Grace*, his Wife, be deemed good service on the said Defendants."

Lord *Brougham*, C. refused to grant an Attachment on the Subpœna served under the above Order. 2 Myl. & Keen, 32. But see *Cameron v. Cameron*, *Ibid.* 289.

END OF PART III. VOL. V.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

NEWTON v. HUNT.

1832: 16th Nov.—1833: 9th January.—*Reversion.—Fraud.—Vendor and Purchaser.*

A Sale, by private Contract of a Reversionary Interest in a Sum of Stock, set aside, on account of inadequacy of Price, and the unjust and oppressive Conduct of the Purchaser.

UNDER the Decree in a Cause of *Newton v. Manning*, 23,333*l.* 6*s.* 8*d.*, and 16,666*l.* 13*s.* 4*d.*, Three per Cents., had been transferred into the Name of the Accountant-General, as a Fund for payment of Annuities of 700*l.* and 500*l.* respectively, to *Harriet De Boinville*, and *John Collins* a Lunatic, for their respective Lives. The 23,333*l.* 6*s.* 8*d.*, Three per Cents., were also subject to the payment of 4,000*l.*, amongst Mrs. *De Boinville*'s Children, after her Death. The Plaintiff, who attained 21 on the 6th of January 1823, was entitled to one-tenth of these Sums of Stock, subject to the Payments before mentioned. In November 1826, he played, at Billiards, with *Charles Hunt*, the Defendant's Son at a Billiard Room in *Cork-street*, belonging to *C. Hunt*, and lost to him 532*l.*; 32*l.* of which he paid, and gave his Note of Hand, payable three months after date, for the remainder. In 1827 the Plaintiff was in great distress for want of Money, and was arrested for Debt. In order to relieve himself from his Embarrassments, he, in August of that year, caused his Interest in the two Sums of Stock to be put up for Sale, by Mr. *Robins*, an "Auc- [*512] tioneer, in two Lots; his Interest in the 23,333*l.* 6*s.* 8*d.*, being Lot 1; and his interest in the 16,666*l.* 13*s.* 4*d.*, Lot 2. The Particulars of Sale stated that Mrs. *De Boinville* was in her 55th year, and in a precarious state of Health, and that *John Collins* was in his 54th year, and a Lunatic. At the Auction, Lot 1 was knocked down to the Defendant *Samuel William Hunt*, for 700*l.* There were several Biddings for Lot 2. The highest was 640*l.* which was 10*l.* less than the Reserved Price; and, there-

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fore, that Lot was bought in at 640*l.* The Defendant had been introduced, by his Son, to the Plaintiff at the Auction; and, in consequence, as he stated in his Answer, of an earnest solicitation and request which he had received, from the Plaintiff, to become the purchaser of Lot 2, he wrote a Note, to the Plaintiff, dated 12th September 1827, in the following words: “Mr. *Hunt* presents his compliments to Mr. *Newton*, and has received his proposal respecting Lot 2, which Mr. *Hunt* must decline. However, as Mr. *Newton* admits that 134*l.* in Reversion, is worth more than 50*l.*, Mr. *Hunt* herewith proposes to buy Lot 2 according to that calculation, that is to say, Mr. *Hunt* will give 500*l.* for it, which is without making any deduction for the difference between Lot 1, the Lady being in bad Health, and Lot 2, the Gentleman being in good Health; viz. as 50 is to 134, so is 500 to 1,333, reckoning Consols at 80.” The Plaintiff accepted the offer; and, on the 5th of October 1827, he executed a Deed by which he assigned both the Lots to the Defendant, in consideration of 1,200*l.* expressed to be paid to him by the Defendant. Four days afterwards, the Deed was tendered to the Defendant, to be delivered over to him on payment of 1,060*l.*, being the Remainder of the Purchase-money for the Lots, after deducting [*513] the Deposit paid on the purchase of Lot 1. The Defendant, however, refused to pay his Purchase-money, unless he was allowed to retain out of it the amount of the Promissory Note, which his Son had indorsed to him in part satisfaction of a Debt, and without notice of the circumstances connected therewith, but upon an understanding that, if the Defendant should be prevented from setting off the Amount against his Purchase-money, the Note should be taken back by his Son. The Plaintiff, accordingly, in Novembrr 1827, filed a Bill against the Defendant to compel a Specific Performance of the Contracts; and, on the 27th of December following, the Defendant paid to the Plaintiff, 1,067*l.*, namely, 567*l.*, (being the residue of the Purchase-money for Lot 1, after deducting the Deposit, together with Interest, on such Residue, from the 29th of September 1827, the day fixed by the Conditions of Sale for Payment of the Purchase-money,) and 500*l.*, being the Purchase-money for Lot 2; and the Assignment was, thereupon, delivered to the Defendant. In October 1831, *Collins*, one of the Annuitants died. In December following the Plaintiff tendered to the Defendant 650*l.*, being 500*l.* for the Purchase-money for Lot 2, and 150*l.* for Interest thereon and the Expenses of the Assignment, and informed the Defendant that, if he refused to accept the Tender and to re-assign Lot 2 to the Plaintiff, the Plaintiff would file a Bill in Chancery against him, to compel a Reassignment.

The Defendant having refused to accept the Money, or to execute a Reassignment, the Bill in this Cause was filed on the 21st December 1831,

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alleging that the Defendant had taken an undue and fraudulent advantage of the Plaintiff's situation and circumstances, in refusing to pay the Balance of his Purchase-moneys except upon the terms of retaining thereout the Amount of the Promissory Note; that the Contracts were not completed until the latter part of December 1827, when, after much difficulty, the Defendant paid the Balance of his Purchase-moneys to the Plaintiff; and, by such delay and breach of good faith, all the advantages for which the Plaintiff had been induced to make the sacrifice of his aforesaid Properties, were entirely lost to him: that the aforesaid Sale of the Plaintiff's Reversionary Interest in the 16,666*l.* 13*s.* 4*d.* Three per Cents., was at a great under-value, and was made, by the Plaintiff, under circumstances of great pecuniary Embarrassment and Distress, and that the Defendant took an undue and fraudulent advantage of the Plaintiff's circumstances and situation, by means whereof he obtained such Reversionary Interest for much less than its real value.

The Bill prayed that the Sale of the Plaintiff's Reversionary Interest in the 16,666*l.* 13*s.* 4*d.* Three per Cents. might be declared fraudulent, and that the Defendant might re-assign the same, to the Plaintiff, who was ready to repay the Purchase-money for the same, with Interest.

Mr. *Morgan*, the Actuary to the Equitable Assurance Office, who was examined for the Plaintiff, deposed that Lot 1 was worth 933*l.*, on the 30th of August 1827, taking the price of Consols at 83*l.* per cent., and that Lot 2 was worth 876*l.* 6*s.* on the 12th of September 1827, taking the price of Consols at 87½: that the difference between the value of the two Lots, was 56*l.* 14*s.*; and that the circumstance of *John Collins* [*515] being a confirmed Lunatic, would make no difference in his aforesaid valuation. The same Witness, on his Cross-examination, said that he had never known Reversionary Interests of the nature of those in question, fetch, in the Market, prices so high as they had been valued at by him and his Predecessor, but that they had generally fetched one Third less; and that he did not believe that either of the Lots was worth, in the Market, the price at which he had valued the same upon his Examination in Chief, and which valuation he had made according to the market price of Consols at the times of the Sales of the Lots, agreeably to the Interrogatory upon which he was examined, which was not the mode in which he usually valued Reversionary Interests; and that he did not believe that either of the Lots would actually fetch prices as high as he had so valued the same.

Mr. *Robins*, who was examined for the Defendant, said that he had had much experience in the sale of Reversionary Interests, but not of so complicated a nature as Lot 2: that the prices at which Reversionary Interests were valued by Actuaries, were, generally, greater, by one Third or thereabouts, than what they sold for in the Market, and that he had not, except in

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one instance, known any Reversionary Interest fetch as high a price as it had been valued at by an Actuary : that, in his Judgment, Lot 2 was worth to sell, in the Market, 600*l.* only.

Sir *E. Sugden* and Mr. *Campbell* for the Plaintiff :

It appears, by the Evidence, that the Plaintiff sold his Reversionary Interests in the two Sums of Stock to answer his pressing exigencies. *Morgan* states that Lot 2 was worth 876*l.* 6*s.* ; but *Robins* says that [*516] it was not worth more than 600*l.* That Lot was sold for 500*l.*

only : so that, according to *Robins's* valuation, it was sold for an inadequate consideration : and it was sold by Private Contract. In Cases of Sales by Reversioners or expectant Heirs, the Court does not look at the market price of the Property sold, but at its value to the Reversioner or expectant Heir. Lot 2 was bought in at 640*l.* ; and, shortly afterwards, the Plaintiff was forced, by his pressing necessities, to take 500*l.* for it. The Defendant then refused to pay the price he had agreed to give, unless he was allowed to retain the amount of the Note of Hand ; and the Plaintiff was compelled to commence a Suit against him, in which the question was not whether the Contract was to be executed—whether the subject was to be had, but whether the price was to be paid. The Note of Hand in respect of which the right of Set-off was claimed, was mere waste paper. This then is a case in which gross fraud and oppression was practised upon the Plaintiff. *Wiseman v. Beake* (a) ; *Peacock v. Evans* (b) ; *Gowland v. De Faria* (c) ; *The Earl of Portmore v. Taylor* (d).

Mr. *Knight* and Mr. *Loftus Wigram*, for the Defendant :

This is not the Case of a Reversion expectant upon a Tenancy for Life, but of a Fund charged with an Annuity ; and, therefore, if the Dividends of the Stock had been reduced, the Annuitant would have been entitled to resort to the Capital.

[The *Vice-Chancellor* :—The Fund consisted of Three per Cents., which are not likely to be reduced.]

[*517] *The Note of Hand was delivered, to the Defendant for value, and without notice of any of the circumstances connected with it. The Plaintiff first files a Bill to compel a performance of the Contract, and then to set it aside. Is there any proof of fraud or advantage taken, by the Defendant, of the Plaintiff ? There is not the slightest Evidence that the Defendant knew any thing of the Plaintiff's circumstances. Throughout the Transaction, the Plaintiff had the advice and assistance of a Solicitor of great experience. *Wiseman v. Beake* was the Case of a Re-

(a) 2 Vern. 121.

(c) 17 Ves. 20.

(b) 16 Ves. 512.

(d) *Ante*, Vol. IV. p. 182.

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mainder of a Family Estate, and the Plaintiff had given *Post Obits* of ten for one. In *Peacock v. Evans*, there were other material circumstances, besides mere inadequacy of price, which are pointed out by *Alexander, C. B.* in his Judgment in *Headen v. Rosher (e)*. In that Case, the same learned Judge said that he could not adopt the principle laid down in *Gowland v. De Faria*. That case was appealed from, and the Appeal was compromised (*f*); *Potts v. Curtis (g)*. If the two Lots are taken together, it will appear that a fair Price was given for them. The Actuary's Valuation amounts to about 1,800*l.* But, in order to ascertain the selling Price, one Third of that Amount ought, according to *Robins's* Evidence, to be deducted; and then the value will be about 1,200*l.*, which was the Sum actually paid.

If the Transaction is impeachable as to one of the Lots, we require to have it set aside *in toto*. The two Lots cannot be separated.

The Suit for Specific Performance, applied to them both; and [*518] they were both included in one and the same Assignment.

The VICE-CHANCELLOR:

In this Case, the Plaintiff attained the age of 21 in January 1823, and was entitled to one Tenth of a Sum of 23,333*l.* 6*s.* 8*d.* Consols, divisible on the death of a Lady aged 55, after deducting the Sum of 4,000*l.* Sterling, and he was also entitled, after the death of a Gentleman aged 54, to one Tenth of a Sum of 16,666*l.* 13*s.* 4*d.* Consols. Both Sums stood in the Name of the Accountant-general of this Court. In November 1826, he went to some Billiard-rooms, *Cork-street*, which were then kept by *Charles Hunt*, Son of the Defendant *Samuel William Hunt*, and had theretofore been kept by the Defendant himself. And the Plaintiff, in playing at Billiards with *Charles Hunt*, lost to him the Sum of 532*l.* of which the Plaintiff paid 32*l.* in Cash, and gave his Promissory Note for 500*l.*, payable at Three Months' date. It is proved that, in 1827, the Plaintiff was in great Distress and arrested for Debt. In August 1827, the Plaintiff caused his two Reversionary Interests above-mentioned to be put up for Sale, by Auction, by Mr. *Robins*, in two Lots. The Interest in the 23,333*l.* 6*s.* 8*d.* Consols, formed Lot 1; the other Interest, Lot 2. The Defendant attended the Sale, and was introduced, at the Sale, to the Plaintiff, by *Charles Hunt*. The Defendant became the purchaser of Lot 1, at the price of 700*l.* and paid a Deposit of 140*l.* Lot 2 was bought in, at the Sum of 640*l.* There were several biddings for it, though it does not appear what

(e) Maclel. & Youn. 89. See 97, *et seq.*

(f) Ibid. 99, Note. See the Observations on *Gowland v. De Faria*, 1 Sugd. Vend. 9th Edit. 266, 267.

(g) 1 Younge, 543

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they were; and Instructions had been given not to let it go for less than 650*l.* After the Auction, some treaty took place, between the [*519] Plaintiff and Defendant, as to Lot 2, which ended in an Agreement to sell Lot 2, to the Defendant, for 500*l.* An Assignment, by one Deed, of both Lots was prepared and approved of by the Defendant's Solicitor, which the Plaintiff executed, and, on the 9th of October 1827, tendered to the Defendant, who then refused to pay his Purchase-money, and insisted that he was the holder of the Promissory Note for 500*l.*, and had a right to set off the amount of it against the Purchase-money. The Plaintiff thereupon filed a Bill, against the Defendant, for a Specific Performance of the Agreements; and the result was that, on the 27th of December 1827, the Defendant performed them, by paying 1,067*l.* (that is) 560*l.* the residue of the Purchase money of Lot 1, with 7*l.* for Interest upon it, and 500*l.*, the Purchase-money of Lot 2, without Interest. There is some Evidence that there had been dealings between the Defendant and his Son, whereby the Son became indebted, to his Father, in more than 500*l.*, and, after the Lots had been agreed to be sold, paid the Note in part discharge of the Debt, with an understanding, as the Answer states, that, in case the Defendant could not Procure the Note to be set off against the Purchase-money, the Note should be returned to the Son. But the Answer states, and the Son, in his Evidence, swears that the circumstances that affected the Note, were not communicated to the Father; some circumstances, however, must have been stated to show that the Note was not a good one. Shortly afterwards, the *cestui que vie* of Lot 2 died, and the Plaintiff tendered, to the Defendant, his 500*l.*, with Interest and Costs, and requested to have the Transaction as to Lot 2, rescinded, which the Defendant refused, and the Plaintiff then filed his Bill to set aside the Sale of Lot 2, on payment of the 500*l.* with Interest.

[*520] *Upon the argument of this Case, it was objected that the Plaintiff could not be relieved as to Lot 2, while the transaction as to Lot 1, remained unimpeached, both Lots having been assigned by one Deed. The Answer is that the Agreements for the two Lots, and the circumstances affecting them, were distinct. One Sale was by public Auction, and the other by private Contract, though, for the sake of convenience, both Lots were comprehended in the same Assignment.

It was insisted that the doctrine laid down in *Gowland v. De Faria*, was overruled by the Decision in *Headen v. Rosher*. But it is observable that, in *Headen v. Rosher*, the only Evidence given by the Plaintiffs, was the opinion of Mr. Morgan that the value of the Reversionary Interest in the 1,000*l.* and the 915*l.* Reduced Annuities, was 928*l.* 8*s.*, and Evidence that

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the Bidding of 910*l.*, at the Auction, was *bona fide*. That Bidding, however, was not only for the 1,000*l.* and the 915*l.* Reduced Annuities, but also for the Moiety in reversion of 800*l.* funded in Court. Therefore, the Bidding itself, being less than *Morgan's* Valuation, though for more Property than he valued, showed that little reliance could be placed upon his opinion as Evidence of Value; whereas the Defendant's Evidence went directly to prove the Price given by him was a fair Price. And there was nothing in the Case of *Headen v. Rosher*, from which it could be inferred that any advantage had been unduly taken, of the Plaintiffs, by the Defendant. That Case was decided in 1825. In 1827 the Case of *Hinckman v. Smith* (h) occurred, and Sir John Leach, Master of the Rolls, then said:—"In *Gowland v. De Faria*, Sir *William [*521] Grant did not consider himself as laying down a new Rule, but as following the current of Authority; and, since that Case, the Rule has been so far regarded as the settled Law of the Court, that, although I have, upon more than one occasion, judicially questioned both the Principle and Policy of the Rule, yet it would not become this Court to make a Precedent in direct opposition to it." I cannot therefore consider the Judgment of the C. B. in *Headen v. Rosher*, as having set aside the Authority of *Gowland v. De Faria*, even with respect to inadequacy of Price alone. Sir William Grant, however, had before him a Case in which the Defendant did take advantage of the Plaintiff's difficulties; and, if similar circumstances exist in the Case before me, I must hold the Plaintiff entitled to Relief.

The direct Evidence as to the Value, is not very satisfactory. Mr. *Robins*, one of the Defendant's Witnesses, states, as I understand him, that the Value of Lot 2, was 600*l.* But the circumstances of this Case shows that unfair advantage was taken, by the Defendant, of the Plaintiff's situation. The Bill and Answer both state that the Agreement to purchase Lot 2, was founded on a Note sent, by the Defendant, to the Plaintiff, on or about the 12th September 1827, and the Plaintiff has proved, as an Exhibit in the Cause, the Note itself, which was in these Words.—[His Honor here read the Note: See *ante*, page 512.]

It is manifest that, when the Plaintiff concluded the Bargain in the Terms of the Note, he was urged by the importunity of Distress to overlook a most important circumstance, namely, that what he was selling was not the Reversion of 1,333*l.* Consols, but of 1,666*l.* 13*s.* 4*d.* * that [*522] is, of 1,333*l.* Consols and one Fourth more. If, therefore, according to the Principle of the Note, 500*l.* was a fair Price for the Reversion of 1,333*l.* Consols, the fair Price for the Reversion of 1,666*l.* 13*s.* 4*d.* must

(h) 3 Ru.s. 453.

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have been 625*l*. The Note also has these Words: "reckoning Consols at 80*l*." It is to be inferred, from the Evidence in this Cause, that, though the Price of Consols was 80*l*. at the time of the Auction, yet, on the 12th of September 1827, it was 87½*l*., that is, nearly one Tenth more. Therefore, upon the Principle of the Note, about 60*l*. more should have been added to the Price, making it, in the whole, 685*l*., or nearly two Fifths more than 500*l*., the Sum named in the Note. Though all this was obvious, the Plaintiff's distress prevented him from seeing it. He caught at the offer of 500*l*. He might, indeed, have come to a similar conclusion, by reasoning on the Price given for Lot 1. For, at the Price of 80*l*., 5,000*l*. Consols would have been sufficient to answer the 4,000*l*. Sterling, and deducting 5,000*l*. Consols, the Reversionary Fund to be divided, would be 18,333*l*., of which one Tenth would be 1,833*l*. and a fraction. If 700*l*. was a fair Price for 1,833*l*., then 1,666*l*. 13*s*. 4*d*. must have been worth, at least, eight Ninths of 700*l*. or 622*l*. and a fraction; and, if the additional Price of one Tenth more were added, on account of the rise in Consols, the Price for Lot 2 might, according to that mode of calculation, have been shown, upon the Defendant's own Principles, to have been worth 680*l*. at least. All this, however, was overlooked by the Plaintiff. He was anxious only for a Sum in hand. But, when he tendered the Conveyance, the Defendant delayed the completion, on a pretext that he had a right to set off the Note for 500*l*. Upon the Stat. [523] of 16 Car. 2, c. 7, it was held that a Note for Money lost "at play, was good in the Hands of a *bonâ fide* Holder. But the Stat. of the 9 Anne, c. 14, makes such a Note absolutely void; and though the Defendant, in his Answer, and his Son, as his Witness, swear that the Defendant did not know under what circumstances the Note was given, it is impossible to refer the understanding stated in the Answer, to have existed as to the Note between the Father and the Son, to any thing but the original nature of the Note. Upon this unjust pretext, however, the Plaintiff was kept out of his Money for several Weeks, was obliged to file a Bill, and, ultimately, received only the 500*l*. without Interest. The conduct of the Defendant was, therefore, oppressive and unjust; and, as he refused to rescind the Transaction, when application was made to him before the filing of the present Bill, the Decree must declare the Plaintiff to be entitled to Lot 2 upon the payment, to the Defendant, of 500*l*. and Interest, without Cost. In the Cases of *Gowland v. De Faria* and *Peacock v. Evans*, Costs were given to the Defendants. But though Relief is given upon the Principle of a Mortgage, the Defendant's Conduct has been so bad, that I must deprive him of his Costs.

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*HYDE v. WHITE.

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1832: 20th Nov.—Agreement.—Pleading.—Parties.

The Plaintiff and his Wife, who was one of the Children of *A.*, agreed with the other Children to divide equally *A.*'s Property at his death. The Plaintiff's Wife died before *A.*, and the Plaintiff was her Administrator. He made an Assignment, by which his Share passed, and afterwards filed a Bill for a Specific Performance. Held that the Agreement was valid; and that the Plaintiff being a Trustee of his Share for the Assignees, the Suit was properly instituted by him.

THE Plaintiff had married one of the Daughters of *Richard White*, deceased. They and the other Children of *Richard White* entered into an agreement, in their Father's lifetime, to divide, equally amongst themselves, the property which their Father should die possessed of. The Plaintiff's Wife died in her Father's lifetime, and the Plaintiff took out administration to her. *R. White* having died, the Plaintiff filed the Bill in this Cause, against the other Children, for a Specific Performance of the Agreement.

Sir *E. Sugden* and Mr. *James Russell*, for the Plaintiff, cited *Wethered v. Wethered* (a), and *Harwood v. Tooke* (b).

Mr. *Pepys*, Mr. *Phillimore*, and Mr. *Jeremy*, for the Defendants, said that, if the Plaintiff's Wife had survived her Husband, she might have repudiated the Contract, and, consequently, it was void for want of Mutuality, for if it was not binding on the Plaintiff's Wife, it could not be binding on the Defendants (c): that the Plaintiff, having assigned all his Property to Trustees for the benefit of his Creditors, had no right to sue for a Specific Performance of the Agreement, which could be performed with the Trustees only, and, therefore, that they were the persons who alone ought to have instituted the Suit.

*Mr. *Jacob* appeared for the Trustees.

[*525]

THE VICE-CHANCELLOR:

The Agreement was not entered into by the married Daughter, but by her Husband; and he, being her Administrator, is a Trustee, of the Share of the Property to which he was entitled under the Agreement, for the Trustees under the Deed of Assignment. On the authority of *Wethered v. Wethered*, and *Harwood v. Tooke*, I think that the Agreement ought to be performed.

(a) *Ante*, Vol. II. p. 183.(b) *Ibid.* 192.(c) *Flight v. Bolland*, 4 Russ. 298.

1832.—Church v. Kemble.

CHURCH v. KEMBLE.

1832. 20th and 23d November.—Will.—Construction.—Election.

A. having power under her Father's Will to appoint a Fund amongst her Children, or more remote Issue, *to be born before such Appointment*, by her Will, appoints the Fund and bequeaths her Personal Estate, to her Four Children. By a Codicil, she, *in case she had power so to do, under her Father's Will, or otherwise*, directed that the Share which one of her Daughters would derive under her Will, should be in Trust for that Daughter for life, and, after her death, for her Children generally, and not those only who were then born, as prescribed by the Power. Held that A. did not intend the Codicil to affect her own Property, but only that which was subject to the Power; and that she did not mean to make the Appointment unless she had power so to do, which she had not, and, therefore, no case of Election arose.

RICHARD HOLBERT, by his Will, dated the 4th of August 1803, gave to Trustees 33,333l. 6s. 3d. Three per Cents. in trust for the separate use of his Daughter, *Elizabeth Wilson*, the Wife of *James Wilson*, for her Life, and, after her Decease, in Trust to transfer the same to the Child, Grandchild, or more remote Issue, or Children, Grandchildren, or more remote Issue, of the said *E. Wilson*, *such Grandchildren or more remote*
 [526] *Issue to be born before any such appointment*, in such Parts, Shares and Proportions, manner and form as the said *E. Wilson*, notwithstanding her Coverture, by Deed, or by her Will, or any Codicil thereto, to be by her signed and published in the presence of, and to be attested by two or more credible Witnesses, should appoint. The Testator died shortly after making his Will.

Elizabeth Wilson, by her Will, dated the 10th of September 1829, and signed and published by her in the presence of, and attested by two Witnesses, after giving several Legacies, gave the residue of her Monies, Securities for Money, Goods, Chattels, Furniture, Plate, Books, Pictures, Prints and other Personal Estate and Effects whatsoever not thereinbefore otherwise disposed of, and also all the Monies, Securities for Money, Property, Estate and Effects, Household Furniture, Plate, Linen, China and other Chattels and Effects which she should have power to dispose of under the Will of her late Father, dated the 4th of August 1803, or otherwise, unto her Children, *Elizabeth Semima Church*, *Emma Wilson*, *Charlotte Wilson* and *James Wilson*, equally to be divided between them, her Daughters' Shares to be for their respective absolute benefit, for their own use exclusively, free from any control from their Husbands.

The Testatrix, on the same 10th of September 1829, made a Codicil to her Will, which was executed in the presence of and attested by two Witnesses; and she thereby, *in case she had the power so to do under the Will*

1832.—White v. Kemble.

of her late Father, or otherwise, willed and directed that the Share and Interest which her Daughter *Elizabeth Jemima Church*, would derive under her Will, should, upon the distribution taking place, be vested in "the Names of the Persons therein named, in Trust to lay the [*527] same out, at Interest, upon Government Securities, and to receive and pay the Interest to *Elizabeth Jemima Church* alone, during her Life, free from her Husband, and her Receipt alone being a good Discharge, and, after her Death, to divide the Principal, equally, among her Children, to be paid on their respectively attaining the age of 21 years, and, in the meantime, the Interest on each Share to be applied towards their Maintenance and Education.

The Testatrix died in December 1829, leaving her before-mentioned Children and two Infant Children of Mr. and Mrs. *Church*, her surviving.

The Bill was filed by Mr. and Mrs. *Church*, against the Trustees and Executors of Mrs. *Wilson's* Will and Codicil, the Trustees of the 33,333*l.* 6*s.* 8*d.* Stock, the Infant Children of Mr. and Mrs. *Church*, and the three other Children of Mrs. *Wilson*, stating that, upon the Testatrix's Death, the Plaintiff, Mrs. *Church*, became entitled to one Fourth of the Stock and of the Residue of the Testatrix's Personal Estate, for her separate use ; but the Infant Defendants alleged that, by the Testatrix's Will and Codicil, the Plaintiff was entitled to one Fourth of such Residue, for her Life only, and that, upon her Death, the same would belong to them ; and that the Will and Codicil raised a Case of Election, on the part of the Plaintiffs, as to the one Fourth of the Stock, and that, if Mrs. *Church* took any Interest under the Will and Codicil, she was entitled to one Fourth of the Stock, for her Life only, and that, upon her Death, the same would belong to her Children. The Bill prayed that one Fourth of the Residue and of the Stock might be paid and transferred to Mrs. *Church*, for [*528] her separate use, or that her Rights and Interests therein might be ascertained and declared by the Court.

Sir *E. Sugden* and Mr. *Barber*, for the Plaintiffs :

The appointment made by the Codicil, included all the Children of Mrs. *Church* that might be born ; and therefore, it went beyond the line prescribed by the Donor of the Power, and by the Law ; and, consequently, it is void. *Leake v. Robinson* (a). No Case of Election is raised by the Codicil ; for that Instrument is confined to the Property which was the subject of the Power ; and the Testatrix says that she does not mean to make the Gift, unless she has the power to make it under her Father's Will or otherwise. She had, however, no such power. A Case of Election never arises

(a) 2 Mer. 363. See *Joe v. Audley*, 1 Cox, 324 ; and *Routledge v. Dorril*, 2 Ves. jun. 357.

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unless a Party does an Act which he believes he has power to do. Besides, the Will and Codicil are distinct Instruments.

If one Fourth of Mrs. *Wilson's* Residuary Estate, passes by the Codicil, then, of course, no Case of Election arises.

Mr. *Macdougall*, for the Infant Defendants, admitted that the Codicil was void as an Execution of the Power; but contended that a Case of Election was raised by it, as it professed to give a limited Interest, in the one Fourth of the Stock, to Mrs. *Church*, whereas she took an absolute Interest under the Will. *Streatfield v. Streatfield (b)*; *Whistler v. Webster (c)*.

[*529] [“The Vice-Chancellor:—The question is whether the Testatrix meant the disposition to take effect in all events, or only in the event of her having the power to make it. If the Testatrix had an absolute, unconditional intention to give what she could not, then a Case of Election would arise.”]

Mr. *Knight* and Mr. *Shapter* for the Trustees named in the Codicil:

If Mrs. *Church* insists on taking a Share of the appointed Fund under the Will, the Effect of the Codicil is to compel her to relinquish the Life Interest thereby given to her in the Testatrix's General Estate. The Codicil refers to the will; and, in the Will, we find that the Testatrix gives her own Property and that which was the subject of the Power, as one entire Fund. The words, “or otherwise,” comprise both her own Property and that which was the subject of the Power. The words: “In case I have the Power so to do,” are implied in every execution of a Power. There is no difference, in substance, between saying: “In case I have the Power,” and: “In pursuance of the Power.” It is clear that the Testatrix intended to dispose, by the Codicil, both of her own Property and of that which was the subject of the Power: and she had the Power so to do, by the operation of the Law of Election. *Bristow v. Warde (d)*; *Moore v. Butler (e)*.

Mr. *Theobald* appeared for the Trustees of *Rishard Holbert's* Will.

The VICE-CHANCELLOR:

I cannot think this to be a Case of Election.

[*530] “It strikes me that all that the Testatrix meant to do by her Codicil, was to dispose of the Property which was the subject of the Power, and not to affect any part of her own Property; and that she only meant to appoint the Property in a given manner, provided she had the Power so to do. But she had no such Power; and, consequently the Codicil is inoperative.

The effect of my Decision is that the Infant Defendants are not entitled to any thing.

(b) Ca. Temp. Talb. 176.

(d) 2 Ves. jun. 336.

(c) Ves. jun. 367.

(e) 2 Sch. & Lef. 249.

1834.—Dewes v. Beresford.

NELSON v. CARTER.

1832 : 21st November.—*Legacy.*

A Legacy of 1,000*l.*, "being Part of the Monies received by J. from my Debtor A. G., but not remitted to me," is specific.

THE Will of the Testatrix in this Cause contained the following Bequest : "I give to the Daughters of *Sarah Hendy*, Relict of Dr. *John Hendy*, of the Parish of *St. Peter's* and Island of *Barbadoes*, and her Grand-daughters that shall be living at my Decease, the sum of 1,000*l.*, being some part of Monies received from my Debtor Mrs. *Ann Greaves*, jun. deceased, but not remitted to me, their Brother *John* having received large Sums for my good Friend his Mother, my Attorney on the Island, and spent it. One of the questions in the Cause was whether the Legacy was demonstrative or specific. The Cases cited were *Rider v. Wager* (a), on the one side, and *Gillaume v. Adderley* (b), *Gittins v. Steele* (c), and *Badrick v. Stevens* (d), on the other.

The *Vice-Chancellor* said that he was clearly of opinion that the Legacy was specific, as it was a "Bequest of part of the Fund [*531] received from *Ann Greaves*, and that *Rider v. Wager* had been over-ruled by a variety of Cases.

Mr. *Knight*, Mr. *Twiss*, Mr. *Blenman*, and Mr. *Sharpe* appeared for the different Parties.

DEWES v. BERESFORD.

1832 : 22d November.—*Jurisdiction.*—*Marshal of King's Bench.*

After a Defendant had been attached by the Sheriff for non-payment of Money, a Writ of *Habeas Corpus cum Causis*, issued in an Action brought against him in K. B., under which he was turned over, by a Judge's Order, to the Marshal of K. B., who suffered him to escape. This Court, on Motion, ordered the Marshall to pay the Money for which the Defendant had been attached.

ONE of the Defendants in this Cause, had been taken, on an Attachment, by the Sheriff of Middlesex, for non-payment of a Sum of Money which he had been directed to pay by the Decree. Whilst he was in the Sheriff's Custody, a Writ of *Habeas Corpus cum Causis*, issued in an Action brought against him in the Court of King's Bench, under which he was carried before one of the Judges of that Court, who committed him to the

(a) 2 P. W. 328.

(b) 15 Ves. 384.

(c) 1 Swans. 24.

(d) 3 Bro C. C. 431. See the Note to that Case in Mr. Bell's Edit.

1832.—Warburton v. Hill.

Custody of the Marshal of the King's Bench Prison. The Plaintiff then moved this Court for a *Habeas Corpus* directed to the Marshal, requiring him to produce the Body of the Defendant in Court; which was ordered. The Marshal, on being served with the Writ, returned that he was unable to obey it, as the Defendant had escaped from his Custody.

Mr. *Knight* and Mr. *Lovat*, for the Plaintiff, now moved that the Marshal might be ordered to pay, into Court, the Money which the Defendant had been directed to pay. They referred to the Cases in which Sheriffs who had suffered Defendants to escape, after having taken them on [*532] Attachments for non-payment of Money, had been ordered to pay the Money (a), and added that, as the Defendant had been handed over to the Custody of the Marshal, under a *Habeas Corpus cum Causis*, he had been transferred, subject to all the Detainers that were in force against him.

Mr. *Kindersley*, *contra*, said, that the Marshal was not an Officer of this Court, as the Sheriff was, and, therefore, could not be subject to its summary jurisdiction.

The *Vice-Chancellor* said that the transferring of the Defendant to the Custody of the Marshal, was merely a substitution of one Ministerial Officer for another, and granted the Motion.

WARBURTON v. HILL.

1832 : 22d November.—*Practice*.—*Administrator*.

In a Suit against the Bank and an Administrator, appointed under 38 Geo. 3, c. 87, the Court on Motion, before Decree, ordered Stock standing in the Testator's Name to be transferred to the Accountant-general.

THE surviving Executor of the Testator in this Cause having absconded and being out of the Jurisdiction of the Court, Letters of Administration to the Testator had been granted, under 38 Geo. 3, c. 87,* to the De-

* It is enacted, by the above Act, that, at the expiration of twelve calendar months from the death of any Testator, if the Executors or Executor to whom Probate of the Will shall have been granted, are or is then residing out of the Jurisdiction of the Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court which hath granted Probate of such Will, upon the application of any Creditor, Next of Kin, or Legatee, grounded on the Affidavit thereinafter mentioned, to grant such special Administration as thereinafter mentioned.

Sect. 3 contains the Form in which the Administration is to be granted. It is partly as follows: "And whereas the Surrogate aforesaid having duly considered the Premises, did, at the Petition of the said

, decree Letters of Administration of all and singular

(a) See Beames on Costs, 178; and *Collard v. Hare*, *ant*, p. 10.

1832.—Brown v. Stead.

fendant **Sarah Hill*. Two Sums of Stock remained standing [*533] in the Testator's Name. The Bill was filed, by the Legatees under the Will, against *Sarah Hill* and the Governor and Company of the Bank of England, praying that *Sarah Hill* might be decreed to transfer the Stock, and to pay the Dividends which remained unreceived, into Court, in Trust in the Cause, and for an Injunction to restrain the Governor and Company from permitting the Executor to sell out or transfer the Stock, or receive the Dividends; and that the Bank might be decreed to permit *Sarah Hill* to make the Transfer.

*The Governor and Company of the Bank, by their Answer, [*534] submitted whether *Sarah Hill* could legally and effectually transfer the Stock and receive the Dividends, under the Letters of Administration granted to her.

Mr. *Barber*, for the Plaintiffs, now moved (before Decree) that the transfer into Court might be made according to the Prayer of the Bill, and that thereupon the Bill might be dismissed against the Bank, with Costs to be taxed and retained by them out of the unreceived Dividends, and that they might pay the residue of the Dividends to *Sarah Hill*, and that she might pay them into Court in Trust in the Cause.

Mr. *Phillimore*, for the Bank, contended that the Order sought must be made by Decree, and not upon Motion, as appeared by the terms of the Letters of Administration.

But the *Vice-Chancellor* granted the Motion, saying that the grant of Administration by the Ecclesiastical Court, justified the Bank in permitting the Transfer.

the Goods, Chattels and Credits of the said deceased to be committed and granted to you the said , named by or on the behalf of the said , a Creditor (Legatee or one of the next of Kin) of the said deceased (as the case may be) limited for the purpose to become and be made a Party to a Bill or Bills to be exhibited against you in any of His Majesty's Courts of Equity, and to carry the Decree or Decrees of any of the said Court or Courts into effect, but no further or otherwise (Justice so requiring)," &c.

The 5th Section enacts, That it shall be lawful for the Accountant-general of the Court of Chancery, or for the Secretary or Deputy Secretary, of the Governor and Company of the Bank of England to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made, of any Stock belonging to the Estate of such deceased Person into the Name of the Accountant-general, in Trust for such Purposes as the Court shall direct, in any Suit in which the Person to whom such Administration hath been granted, shall be or may have been a Party.

*BROWN v. STEAD.

[*535]

1832: 23d November.—*Mortgagor and Mortgagee.—Priority.*

A second Mortgagee took a Conveyance of the Equity of Redemption, in consideration of the Debts due to himself and the other Mortgagees, which he thereby took upon himself and

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covenanted to pay. Held that his Debt was extinguished, and, therefore, that in a Foreclosure Suit instituted against him, by the Parties entitled to the First and Third Mortgages, he was not entitled to be paid his Debt, in priority to the Third Mortgage.

By an Indenture of the 16th of April 1819, *J. R. Ogden* mortgaged certain Messuages and other Hereditaments, to the Plaintiffs, for 500 years, for securing the repayment, with Interest, of 2,000*l.* lent to him by the Plaintiffs. By Indentures of the 1st and 2d of November 1824, *Ogden* mortgaged the Premises to the Defendant, in Fee, for securing the repayment of 1,200*l.* with Interest. By an Indenture of the 14th of March 1825, *Ogden* charged the Premises with the repayment to the Plaintiffs of 600*l.* and Interest on the 10th of September then next. By an Indenture of the 31st of October 1829, made between *Ogden*, of the one part, and *Stead*, of the other part, after reciting the Indentures before mentioned: that upon an Account taken, 3,098*l.* 1*9s.* 2*d.* was found and admitted to be due, to the Plaintiffs, up to the day of the date of the Indenture now in statement, and that, upon an account stated and settled between the Defendant and *Ogden*, 1,625*l.* was found due to the former, and that those two Sums were considered to be the full Value of the Premises; and that the Defendant had agreed with *Ogden* for the absolute purchase of the Premises for 4,723*l.* 1*9s.* 2*d.*, out of which he was to pay the 3,098*l.* 1*9s.* 2*d.* to the Plaintiffs, the first Mortgagees, and to retain the remainder of the Purchase money in satisfaction of his Mortgage-debt: It was witnessed that in consideration of the 3,098*l.* 1*9s.* 2*d.* due from *Ogden* to the Plaintiffs, the payment of which the Defendant thereby took upon himself and [536] upon his Heirs, Executors, Administrators and Assigns, and also in consideration of the 1,625*l.*, (which two Sums, amounting together to 4,723*l.* 1*9s.* 2*d.*, were mentioned to be the consideration for the absolute purchase of the Premises,) *Ogden* conveyed the Equity of Redemption of the Premises, subject to the Mortgage and further charge to the Plaintiffs and the principal Sums and Interest secured thereby, to the Defendant in Fee; and the Defendant covenanted with *Ogden* to pay such principal Sums and Interest, and all Costs, Charges and Expenses relating thereto.

The Defendant not having paid what was due to the Plaintiffs, they filed a Bill of Foreclosure against him.

The Defendant, in his Answer said that his Mortgage of November 1824, was a prior Incumbrance to the Plaintiff's further charge of March 1825; and he denied that he had covenanted, in the Indenture conveying to him the Equity of Redemption of the Premises, to pay off the 2,000*l.* and 600*l.* and the Interest accrued due thereon, except that, by such Indenture, it was agreed that such Sums were to be raised from the said Hereditaments and Premises.

1832.—*Brown v. Stead*.

Sir *E. Sugden* and Mr. *Wilbraham*, for the Plaintiffs :

The Conveyance of October 1829, operated as an extinguishment of the Debt due from *Oyden* to the Defendant, and also as an assumption, by the Defendant, of the Debts due to the Plaintiffs. An aggregate Sum was made of all the three Debts, and that Sum was made the consideration for the Conveyance. The recitals of the Deed show that the Parties intended that the Conveyance should be a satisfaction of the Defendant's Debt, and that the Debt due to the Plaintiffs, *were the only [*537] Debts to which the Estate was to be subject ; and the Defendant has covenanted to pay them. If the Defendant's Debt still exists, he cannot have the Equity of Redemption. He cannot have one Fee-simple as Purchaser, and another as Mortgagee. He has but one Fee-simple in him. *Toulmin v. Steere* (a) *Parry v. Wright* (b).

Mr. *Knight* and Mr. *G. Richards*, for the Defendant :

The Cases of *Greawold v. Marsham* (c), and *Mocatta v. Murgatroyd* (d), do not warrant the position in support of which they were cited by Sir *W. Grant*, M. R. in *Toulmin v. Steere*. *Mocatta v. Murgatroyd* is, if any thing, an authority in our favour. The third point decided in that Case, was : " That though A., the Mortgagee, where there were subsequent Mortgages, took, afterwards, a Release of the ultimate Equity of Redemption, yet this did not oblige the said A., who had taken a Release of such Equity, to pay the intermediate Mortgages provided he would still waive the Release made to him of the Equity." Here we are desirous of waiving the conveyance of the Equity of Redemption. If *Stead* had brought an Action on his Bond, against *Oyden*, *Oyden* could not have pleaded the Release of 1829.

The Case of *Parry v. Wright* has very little to do with the present question. There, certain prior Securities had been gotten in, and the Defendant wanted to set them up again ; but that was impossible, as the Securities had been gotten in, and the Defendant had no Equity for setting them up again.

**Stead*, when he took the Conveyance of 1829, intended to [*538] save *Oyden* harmless, but not to place the Plaintiffs in a better situation than they were in before. *Stead* is at liberty to waive the Benefit of the Conveyance of 1829, if he thinks fit, and therefore *Oyden* ought to have been made a Party to the Suit.

The VICE-CHANCELLOR :

My opinion is that the Transaction of 1829, destroyed the Debt at Law. It is clear that, if the Debt was not destroyed at Law, it was in Equity ;

(a) 3 Mer. 210.

(b) 1 Sim. & Sta. 248.

(c) 2 Ch. Ca. 170.

(d) 1 P. W. 322.

1832.—Tucker v. Harris.

and, if *Stead* had brought an Action on his Bond, this Court would have restrained the Action. The Release of 1829, itself, manifestly shows that it was the intention of the Parties that *Stead* should take the Estate burdened with the Debts due to the Plaintiffs, and, therefore, he must be bound by the Terms of the Deed; and the Plaintiffs are clearly entitled to the Relief they ask.

TUCKER v. HARRIS.

1832: 23d November.—Will.—Construction.—Portions.—Vesting.

Testator gave 5,000*l.* to Trustees, in Trust for his Daughter *E.* for Life, and, after her Death, in Trust to apply the Interest for the maintenance of all her Children *as should be living at her Death*, during their Minorities, and, on their attaining 21, in Trust to transfer the same equally between them. But if *E.* should die without leaving any such Child, or leaving such they should all die under 21, then to transfer the same unto such Children of *F.*, as should be living at *E.*'s Death without Issue. One of *E.*'s Children attained 21, but died in *E.*'s lifetime. Held that that Child did not take a vested Interest.

THOMAS JOHNSON, Esq., being possessed of 22,000*l.* Four per Cent. Bank Annuities, and 4,500*l.* Royal Exchange Assurance Stock, by his Will, dated the 29th of March 1794, gave the 22,000*l.* Four [*539] per Cents. to Trustees, and then expressed himself *as follows :

“ And, as to the Sum of 5,000*l.* Bank Four per Cent. Annuities, part of the said Sum of 22,000*l.* Bank Four per Cent. Annuities, upon Trust to pay and apply the Interest and Dividends of the said Sum of 5,000*l.* Bank Four per Cent. Annuities, unto my Daughter *Elizabeth Minshaw* (wife of *Harry George Minshaw*) for and during the Term of her natural Life, upon her own single and separate Receipt and Receipts, and not to be anywise subject to the Control, Debts or Engagements of the said *Harry George Minshaw*, or any future Husband or Husbands, and, from and after the Decease of my said Daughter *Elizabeth Minshaw*, upon Trust to pay and apply the Interest and Dividends of the said Sum of 5,000*l.* Bank Four per Cent. Annuities, for the Maintenance, Education, Benefit and Advantage of all and every the Child and Children of my said Daughter *Elizabeth Minshaw*, as shall be living at the time of the Decease of my said Daughter, during their respective Minorities, and, on their respectively attaining the Age of 21 Years, upon Trust to transfer the said Sum of 5,000*l.* Bank Four per Cent. Annuities, equally between them, Share and Share alike; but in case my said Daughter, *Elizabeth Minshaw*, shall happen to depart this Life, without leaving any such Child or Children, or leav-

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ing such, if such Child, or all such Children shall happen to depart this life before attaining the Age of 21 Years, then and in such case upon Trust to transfer the said Sum of 5,000*l.* Bank Four per Cent. Annuities, unto and equally between such Children of my said Son *Freelove Johnson*, or of my Daughters, *Sarah Wilson* and *Mary Johnson*, as shall be living at the time of the Decease of my said Daughter, *Elizabeth Minshaw without Issue*, or of the last of such Issue under 21, and with the like power to my Executors and Trustees to apply the Interest of their re- [*540] spective Shares therein, for their Benefit, during their respective Minorities. And, as to the Sum of 1,000*l.* Royal Exchange Assurance Stock, part of the said Sum of 4,500*l.* Royal Exchange Assurance Stock, upon Trust to pay and apply the Interest and Dividends of the same, to my said Daughter *Elizabeth Minshaw*, for and during the Term of her natural Life, upon her own single and separate Receipt, and with the like Remainders in favour of her Issue, and, in default thereof, in favour of the Issue of my other Children as is hereinbefore directed and appointed in respect of the said Sum of 5,000*l.* Four per Cent. Bank Annuities hereinbefore left for their Benefit as aforesaid."

Elizabeth Minshaw survived her Husband, and died in February 1832. They had Issue three Children only, namely *Mary*, *Harriet Freelove*, and *Elizabeth Louisa*, all of whom had long since attained 21. *Mary* married the Defendant *Harris*, *Harriet Freelove* married the Defendant *Davidson*, and *Elizabeth Louisa* married the Plaintiff, and died in February 1830 without leaving any Issue.

The Plaintiff, having taken out Administration to his Wife, filed his Bill against Mr. and Mrs. *Harris*, and Mr. and Mrs. *Davidson*, and their Children, and also against the Testator's Personal Representatives, praying that one Third of the 5,000*l.* Four per Cents, and 1,000*l.* Royal Exchange Assurance Stock, might be transferred to him. Mr. and Mrs. *Harris* and Mr. and Mrs. *Davidson* put in a general Demurrer to the Bill.

The question was, whether Mrs. *Tucker* took a vested Interest in one Third of the 5,000*l.* Bank Annuities and *1,000*l.* Royal [*541] Exchange Assurance Stock, on her attaining 21, notwithstanding she died in her Mother's lifetime?

Sir *E. Sugden* and Mr. *Rudall*, in support of the Demurrer, said that it appeared, from the whole frame of the Will, that the Testator did not intend to give any Benefit, except to Persons who should be living at the time when the previous Interests failed of effect: that there was no Bequest, in the Will, in which the words of contingency were dropped: that, where it was evident from the language of the Instrument, that Children were not to take unless they survived their Parents, the Court must hold that their Interests are con-

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tingent. *Howgrave v. Cartier* (a); *Fry v. Lord Sherborne* (b); *Hotchkin v. Hamfry* (c); *Fitzgerald v. Field* (d); *Salkeld v. Vernon* (e); *Billingsley v. Wills* (f); *Howes v. Herring* (g). The Case of *Torres v. Franco* (h) is clearly distinguishable from the present Case: for, there, a Trust was declared for such only of the Children as should survive their Mother, and yet the Gift over was not to take effect unless all the Children died under 21 and unmarried; and, on account of that inconsistency in the Settlement, it was held that the Son who attained 21, took a vested Interest, though he died in his Mother's lifetime.

Mr. *Pepys* and Mr. *James Russell*, in support of the Bill:

This is the Case of a Will, and not of a Settlement. In either [*542] case, however, the Court struggles to give the *Child a Property that it may rely upon, and not a Property which is contingent on its surviving the Parents; and though, the Instrument describes those Children only who may survive both or either of their Parents, it is construed to include all the Children. The language used by the Testator has proceeded from his supposing that they would all be Minors at the Death of their Mother. In *Powis v. Burdett* (i), there was no description of a Child who should not survive the Father; and yet Lord *Eldon* held that the Son who attained 21, but died in the lifetime of the Father, took a vested Interest. The reasoning of Sir *W. Grant*, in *Howgrave v. Cartier* (k), applies, almost *verbatim*, to this Case. His *Honor* says: "As I have said, all depends upon the correct use of the word *such*, which restrains it to Children surviving the Parents, and being 21, or afterwards attaining that age. Throughout the whole Settlement, this word *such*, is, in various instances, not only incorrectly, but so absurdly and unmeaningly applied, that it is evident the Parties had no precise or definite notion of the effect of its introduction in any given Clause." So in this Case, the word *such* is used so as to have no meaning, or to lead to an absurdity. It is impossible to distinguish *Torres v. Franco* from the present Case. Here the first Gift is for the Benefit of the Children of *Elizabeth Minshaw* who should be living at her Death; but, under the Gift over, no Persons are to take, unless they are living at the Death of *Elizabeth Minshaw* without Issue. *Maitland v. Chalie* (l).

There is another Part of the Will which strengthens our Case; [*543] and that is the Gift of the Royal Exchange *Assurance Stock to *Elizabeth Minshaw*, with the like Remainders in favour of her Issue, and, in Default thereof, in favour of the Issue of the other Children of

(a) 3 Ves. & Beam. 79.

(d) 1 Russ. 416.

(g) Maclell. & Youn. 295.

(i) 9 Ves. 423.

(b) *Ante*, Vol. III. p. 243.

(e) 1 Eden, 64.

(h) 1 Russ. & Myl. 649.

(k) 3 V. & B. 29; *see* 89.

(c) 2 Madd. 65.

(f) 3 Atk. 219.

(l) Madd. & Geld. 243.

1834.—Tucker v. Harris.

the Testator. Clearly, therefore, in this Will, there is no Gift over except on a general failure of Issue of *Elizabeth Minshaw*: and, that being so, the Question is at an end; for, according to *Perfect v. Lord Curzon (m)*, the Gift over must be such as necessarily to take effect if there should be no Child living at the Death of *Elizabeth Minshaw*, who should attain 21.

The VICE-CHANCELLOR:

The Question is whether this Case can be brought within the principle of *Perfect v. Lord Curzon*, or, in other words, whether there is any ambiguity as to the event on which the Limitation over is to take effect. I confess it appears to me to be rather a plain Case, and that there is no such ambiguity.

In Cases of Settlements, if there is reason to collect, however loose and ambiguous the language may be, that all the Children of the Marriage were intended to take, then, although there may be Words which go to express that those only shall take who shall be living at the Death of the Parent, the Court holds that all the Children who attained the Age of 21, although they died in the lifetime of the Parent, shall take. A Gift by Will differs from the Case of a Trust declared by a Settlement, because, in the former, there is no supposition that any Persons can be intended to take, except those who are described as takers. In this Case, the Testator has given the Sum of 5,000*l.* Stock to Trustees, upon Trust to pay the Interest and Dividends thereof to his *Daughter, during the term [*544] of her natural Life, and, after her Death, upon Trust to pay and apply the Interest and Dividends thereof for the Maintenance and Education of all and every the Child and Children of his Daughter as should be living at the time of her Decease. That part of the Will is perfectly clear and unambiguous, and it affords the first Declaration of the Testator's Intention that those Persons only should take in Remainder, who should answer the Description of Children living at the Death of the Daughter. He then proceeds: "During their Minorities, and, on their respectively attaining the Age of 21 years, upon Trust to transfer the said Sum of 5,000*l.* equally between them, Share and Share alike; but, in case my said Daughter shall happen to depart this Life, without leaving any such Child or Children," that is, living at her Death, "or leaving such, if such Child or all such Children shall happen to depart this Life before attaining the Age of 21 years, then upon Trust to transfer the said Sum of 5,000*l.*, unto and equally between such Children of my Son or of my Daughters (describing them) as shall be living at the time of the Decease of my said Daughter, *Elizabeth Minshaw*, without Issue, or of the last of such Issue under 21." And the question is whether, in consequence of the testator having used

(m) 5 Madd. 442.

1832.—*Hinxman v. Poynder.* *

this word "Issue," it can be said that Issue, generally, were meant. It is clear to me that this Will, itself, affords the construction that Issue, generally, cannot be meant, and that the words, "without Issue," must be taken to refer to the Event which he has first described in making the Gift over, namely, the Event of the Daughter dying without leaving any *such* Child or Children; and, when he says: "or of the last of such Issue," he means the last of such Issue as he has before spoken of in the second [*545] Branch of the Contingency that he has before described, where he says, "or leaving such, if such Child, or all such Children, shall happen to depart this Life before attaining the Age of 21 years." And that, by the term *Issue*, the Testator did not here mean Issue, generally, but Children, I think, is manifest from the Clause which relates to his Royal Exchange Assurance Stock: for, there, he directs the Trustees: "to pay the Interest of the same, to my Daughter *Elizabeth* for and during the Term of her natural Life, upon her own single and separate Receipt, and, with the like Remainders in favour of her Issue, and, in Default thereof, in favour of the Issue of my other Children, as hereinbefore directed in respect of the said Sum of 5,000*l.*" Now there is no Gift, whatever, to any Issue of a Child, other than to the *Children* of that Child, therefore it is clear that, when in this latter clause, he uses the Term "Issue," he refers to the Children of a Child; and he must be taken to have used that Term, in the same sense, in the former Clause, in which he gives over the 5,000*l.* in the event of his Daughter dying without Issue: and, when he says: "the last of such Issue," he can only be speaking of the last Survivor of the Children of his Daughter that might happen to be living at her Death.

This Will, therefore, so clearly interprets itself, that there can be no doubt as to the meaning of the general Expressions used in it.

Demurrer allowed.

[*546]

**HINXMAN v. POYNDER.*1832: 23d November.—*Will.—Construction.*

A Testator gave all his Property to Trustees, and declared that he had made no Provision for his Grand-daughter *K. H.* because her deceased Father had, in his lifetime, received more than his other Children would become entitled to under his Will. He then declared Trusts of an equal Share of his Property for each of his surviving Children, for their Lives, with Remainders to their Children. He then made a Codicil as follows: "My dear Daughters, is that you do give my dear Grand-daughter *K. H.*, 1,000*l.*, and that you will be kind to *E. S.* And it is my desire that you do give her some Part of my Table-linen and Sheetting. This is my last Wish." By a subsequent Codicil, he made some alteration in the Bequest made, by his Will, in favour of one of his Daughters, and, subject thereto, confirmed his Will. Held that the second Codicil confirmed the first, as being Part of the Will, and that

1832.—*Hinxman v. Poynder.*

the concluding Sentence of the first Codicil, was sufficient to create a Bequest of the 1,000*l.*, to *K. H.*, and that, as the Articles specifically given by it to *E. S.*, passed, by the Will, to the Trustees, and not to the Daughters, so the 1,000*l.* was to be paid, not by the Daughters out of their Life Interests, but by the Trustees, out of the Testator's general Personal Estate.

JOHN BLEADEN, deceased, by his Will dated the 26th of June 1812, gave all his Real Estates to Trustees, in Trust to sell the same as soon as conveniently might be after his Decease; and he directed that the proceeds should become part of the entire Sum or Fund thereafter mentioned, and be disposed of therewith; and he declared that he had made no provision for the Plaintiff, *Katherine Hinxman*, the Daughter of his Son *Charles Bleadon*, because her Father had received of him, in his lifetime, divers Sums of Money amounting to more than his other Children had severally received from him or would become entitled to under his Will; and he declared his wish to be that all his Children should be, as nearly as possible, equally benefited from his Property: and he gave all his Personal Estate to the same Trustees, and directed that the same and [547] the Monies to arise from the Sale of his Real Estates, should form one entire Sum or Fund, and that the Trustees should stand possessed thereof in Trust to pay his Debts and Legacies; and he gave to them 4,000*l.* out of the said Sum or Fund, and directed them to invest the same, and the Residue of the same Sum or Fund, in the usual Securities, and to stand possessed of 2,000*l.*, part of the 4,000*l.*, and also of one Fourth part of the Residue of such Trust monies, upon Trust for his Daughter *Sarah* the Wife of *A. H. Steward*, for her Life, for her separate use, and, after her Decease, in Trust for such persons as she should appoint, and, in default of Appointment, in Trust for her Children: and he declared similar Trusts as to another Fourth part of the Residue of the Trust monies, in favour of his Daughter *Edith Meyer*, Widow, and her Children, and, as to the remainder of the 4,000*l.* and another Fourth part of the Residue of the Trust monies, in favour of his Daughter *Catherine*, the wife of *Frederick English*, and her Children, and as to the remaining Fourth part, in favour of *Mary* the Wife of *Robert Wiltshire* and her Children: and he declared that he made the Provision of 2,000*l.* for *Mrs. Steward* and *Mrs. English* beyond the Provision made for his two other Daughters, because he had, on the Marriages of the latter, advanced them 2,000*l.* a piece: and he appointed the Trustees his Executors.

The Testator made two Codicils, one dated in 1818, and which was mentioned, in the Bill, as the first Codicil, and another without date, but which was written, by the Testator himself, on a piece of Paper containing an account of his Property. By the Codicil of 1818, after reciting

1832.—*Hinxman v. Poynder.*†

[*548] that he had sold out 4,000*l.*, Four per Cents., and advanced the Proceeds to *Robert Wiltshire*, and that it was his intention that his Daughters' Fortunes should be as nearly equal as possible, he directed that a Sum equivalent to the 4,000*l.* Stock, should be deducted from Mrs. *Wiltshire's* Share of his Property, so that the Shares of his other Daughters might not be lessened by the Sale of the 4,000*l.* Stock : and, subject to the above alteration, he ratified and confirmed his Will.

The other Codicil was as follows: (a) " My dear Daughters, Mrs. *Steward*, Mrs. *Meyer*, Mrs. *Wiltshire* and Mrs. *English*, is that you do give my dear Grand-daughter, *Kate Bleaden*, 1,000*l.* in Money, to her own use, &c. &c. and that you will be kind to my good and faithful Friend *Elizabeth Sumerset* of *Brook street*, and it is my desire that you give her some part of my Table-linen and Sheeting, six Spoons, Silver, six Tea Spoons, six Silver Table Forks, six ditto Dessert, and, to all my faithful Servants, whatever you shall think proper for them ; this is my last wish, God bless you and your's, Amen. Pray be kind to *Elizabeth Sumerset*."

The Testator died in September 1819. The Executors having declined to prove the Codicil without date, the Plaintiffs instituted proceedings in the Ecclesiastical Court, by which its validity was established, and Probate of it was granted to the Executors.

The Bill prayed that the Legacy of 1,000*l.* might be paid to [*549] the Plaintiffs, Mr. and Mrs. *Hinxman*, either out of the Testator's general Personal Estate, or by his Daughters.

Sir *E. Sugden* and Mr. *Wigram* for the Plaintiffs.

The Solicitor-general and Mr. *James*, for the Defendants, Mr. and Mrs. *Steward*, Mr. and Mrs. *Wiltshire*, and Mr. and Mrs. *English* :

The Testator's Daughters are Tenants for Life only of their Shares of his Property ; and they are not his Executors. The Codicil of 1818 does not allude to the prior Codicil (b), but it does to the Will, which it ratifies and confirms, subject only to the alteration thereby made. The effect of that Codicil, therefore, was to revoke the prior one.

The Codicil of 1817, if it be not revoked, contains no Gift. It is not imperative, but leaves it to the discretion of the Daughters either to give or not to give the 1,000*l.* to Mrs. *Hinxman*. There is no certainty as to the Fund out of which the 1,000*l.* was to be paid ; and that alone is fatal. If, however, there is any Gift at all, it must be satisfied out of the Corpus of the Testator's Property.

(a) Several of the words in this Codicil were mis-spelt, and there was an omission after Mrs. *English's* name.

(b) The Codicil without date, was spoken of, by the Counsel for the Defendants, as being dated in 1817, because the Account before-mentioned was so dated.

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Mr. *Jacob*, for the Executors of Mrs. *Meyer*, who died pending the Suit :

The Court cannot act on the Codicil of 1817. It begins thus : " My dear Daughters, Mrs. *Steward*, Mrs. *Meyer*, Mrs. *Wiltshire* and Mrs. *English*, is that you do give." The Court must interpolate words, in order to "give any meaning to the Codicil. There is more [*550] reason for interpolating recommendatory words, than imperative ones ; for all the other words in the Codicil, are recommendatory, especially those that relate to *Elizabeth Sumersset*. It might as well be contended that the words &c. &c., include all the Sums mentioned in the Account, as that the Testator intended to use imperative words. If there is any Gift, it must come out of the Corpus.

Mr. *Knight*, Mr. *James Russell* and Mr. *Lane* for the Defendants, the Children of the Testator's Daughters :

The Codicil of 1818, which was executed subsequently to the other, republishes the Will, and makes it speak as from its own date ; so that, in 1818, the Testator declared that he had made no Provision for Mrs. *Hinxman*. The Codicil of 1817 is an imperfect Instrument. It cannot be made intelligible, unless words of recommendation are supplied. All the other expressions in the Codicil are of that nature. The Court cannot hold the 1,000*l.* to be a Legacy, without contravening the expressed intention in the Will, that all the Children were to share, equally, in the Testator's Property. If there is any Gift, the Testator clearly intended that it should be made good by his Daughters ; for, if he intended it to come out of the Corpus of his Property, why did he name his Daughters ?

The VICE-CHANCELLOR :

The Ecclesiastical Court, which is the only Court that has cognizance of Matters of this nature, has admitted the Codicil of 1817 to Probate. It was argued that the Codicil of 1818 revoked the one in question : but, when "a subsequent Codicil confirms the Will, it confirms a prior Codicil as being part of the Will. [*551]

It is manifest that the Testator was a very illiterate Person, and that he has omitted some words, in this Codicil, after mentioning the Names of his Daughters : but the concluding sentence, " This is my last Wish," is sufficient to make sense of it. The words, *f.c. f.c.*, may be rejected, the meaning being complete without them. The question then is whether the Legacy of 1,000*l.*, is to be paid, by the Daughters, out of their Life Interests, or whether it is to come out of the Corpus of the Testator's Estate. Now it is observable that the Testator has directed, by this Codicil, certain specific Articles to be given, by his Daughters, to *Mary Sumersset*. But the Daughters could not give them, as they were given, by the Will, to the Executors.

 1833.—*Bourne v. Hall.*

This Testamentary Paper, therefore, is sufficient to show that Mrs. *Hinxman* was to have the 1,000*l.* out of the Testator's general Personal Estate.

Declare that the Plaintiffs are entitled to be paid the 1,000*l.* out of the Testator's general Personal Estate.

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*CROWLEY v. PERKINS.

1832: 26th November.—*Practice.*—*Production of Documents.*

Defendant to a Bill of Discovery in aid of an Action, ordered to produce, at the Trial, Documents set forth, in the Schedule to his Answer, as being in his Custody.

MR. KNIGHT moved that the Defendant to a Bill of Discovery in aid of an Action at Law, might be ordered to produce, at the Trial of the Action, the Documents set forth, in the Schedule to his Answer, as being in his Custody.

The Question was whether it was the Practice of the Court to do more than order the Documents to be produced and left with the Clerk in Court for the usual purposes.

But the *Vice-Chancellor* ordered the Documents to be produced at the Trial.

BOURNE v. HALL.

HALL v. BOURNE.

1832: 26th November.—*Practice.*—*Cause and Cross Cause.*

Proceedings in the original Cause stayed, until the Plaintiff had appeared to and answered the Cross Bill.

BOURNE, who was resident in *Ireland*, filed a Bill against *Hall*. *Hall* filed a Cross Bill against *Bourne*, but could not serve him with a Subpoena, as he was resident in *Ireland* (a). When Publication was just about to pass in the original Cause.

Mr. *Rolfe*, for *Hall*, moved that the Proceedings in the original Cause might be stayed, until *Bourne* had appeared to and answered the Cross Bill.

(a) See *Parker v. Lloyd*, ante, p. 508.

1832.—Winpenny v. Courtney.

Mr. *Gardner* *contra*, referred to *Bond v. Newcastle* (b) and *Anderson v. Lewis* (c).

The VICE-CHANCELLOR:

It is quite a matter of course. Take the Order (d).

*PEACOCK v. SIEVIER.

[*553]

1832: 28th November.—Practice.—Dismissal.

An Order to amend obtained after Notice of a Motion to dismiss, but served before the Motion is made, is an Answer to the Motion; but the Plaintiff must pay the Costs of the Motion.

THE Defendant served the Plaintiff with a Notice of a Motion to dismiss the Bill for want of Prosecution. On the next day, the Plaintiff obtained, by Petition at the Rolls, an Order to amend his Bill, and served it on the day following, which was the day on which the Motion to dismiss was to be made according to the Notice. The Motion, however, was not made for some time afterwards.

Mr. *Wakefield*, in support of the Motion, referred to *Swinfen v. Swinfen* (a).

Mr. *Lewis*, for the Plaintiff, cited *Davenport v. Manners* (b).

The Vice-Chancellor said that an Order to amend, obtained and served before a Motion to dismiss was made, was an Answer to the Motion, but that the Plaintiff must pay the Costs of the Motion.

WINPENNY v. COURTNEY (a).

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SAMPSON v. WINPENNY.

Practice.—Witness.—State of Facts.

After the Depositions on a State of Facts carried in under a Decree, have been published, no other Person, whether a Party to the Cause or not, can be examined as a Witness, without an Order of Court, warranted by special Circumstances.

THE Decree directed that, for the purpose of making the Inquiries which it directed, the Parties should be examined on Interrogatories, as the *Mas-*

(b) 3 Bro. C. C. 386.

(d) See *Waterton v. Croft*, ante, p. 502.

(a) *Ante*, Vol. III. p. 384.

(a) *Ex relations*.

(c) 3 Bro. C. C. 429.

(b) *Ante*, Vol. II. p. 514

1832.—Nail v. Punter.

ter should direct; and, in support of the State of Facts carried in by the Defendant *Winpenny* under the Decree, Witnesses had been examined, and their Depositions published. *Winpenny* afterwards proposed to examine the Defendant *Courtney* as a Witness, and the *Master* certified that, in his opinion, *Winpenny* ought to be at liberty to examine him. The Plaintiff *Sampson* excepted to that Certificate.

The VICE-CHANCELLOR :

Considering the Nature of the Case, I do not see how the truth could be ascertained, without giving the Persons interested an opportunity of examining *Courtney* in some manner. But the direction in the Decree, could not amount to more than making him *liable* to be examined as a Witness.

According to the Decision of Lord *Hardwicke*, in *Shepherd v. Collyer*, cited by Lord *Eldon* in *Willan v. Willan* (b), and Lord *Eldon's* Decision in *Willan v. Willan*, after the depositions of Witnesses upon a State of Facts, have been published, a new Witness cannot be examined without an Order of Court warranted by special circumstances. Admitting, therefore, that *Courtney* might, before the Depositions were published, have [*555] been examined as a Witness, yet no attempt was made to examine him while other witnesses were under examination, although the Defendant *Winpenny* must have been aware, from the Pleadings, what was the view which *Courtney* took of the circumstances, and what knowledge he had of them: and as no special circumstances appear why he should now be examined, I am of opinion that the *Master's* Certificate is wrong, and the Exception must be allowed.

NAIL v. PUNTER.

1832: 1st, 3d and 10th December.—*Trustee and Cestui que Trust.*

Stock was settled on a Wife, for her separate use, for Life, with a Power of Appointment by Will. The Trustees, at the request of the Husband and Wife, sold out the Stock, and paid the proceeds to the Husband, who afterwards became Bankrupt. The Wife filed a Bill to compel the Trustees to replace the Stock, and obtained a Decree, under which the Trustees transferred Part of the Stock into Court, and they were allowed Time to transfer the Remainder. The Wife died, having, by her Will, appointed the Stock to her Husband, and appointed him her Executor. He filed a Bill of Revivor and Supplement against the Trustees, and his Assignees, claiming the Stock under the Appointment, and praying the same Relief as his Wife might have had. But, as he had received the Proceeds of the Stock sold out, his Bill was dismissed.

UPON the Treaty for the Marriage between *William* and *Ann Nail*, it

(b) 19 Ves. 594.

1832.—*Nail v. Punter.*

was agreed that 200*l.* part of 1,600*l.* Three per Cent. Consols, belonging to Mrs. *Nail*, should be sold, and the Proceeds lent to *William Nail*, on the security of certain Leasehold Property, and of his Warrant of Attorney, and that 1,400*l.*, the Residue of the Stock, should be transferred to *Ward* and *Punter*, upon the Trusts after mentioned. Accordingly the 200*l.* Stock was sold, and the Proceeds, amounting to 158*l.*, were lent to *William Nail*, who executed the Securities agreed upon, to *Ward* and *Punter*, and Mrs. *Nail* transferred to them the Residue of the Stock, amounting to 1,400*l.* By an Indenture of the 1st of January 1818, it was declared that *Ward* and *Punter* should stand possessed *of [*556] the 1,400*l.* Stock, in Trust, to pay the Dividends to Mrs. *Nail*, for her separate use, during her Life, and, after her Decease, to transfer the Capital, together with all Dividends then due thereon, to such Persons as she should, by her Will, appoint, and that the Trustees should stand possessed of the 158*l.*, and the Interest thereof when received by them, upon Trust to pay the same to Mrs. *Nail* for her Life, and, after her Decease, to such Persons as she should, by her Will, appoint (a).

After the Marriage, the Trustees, at the request of Mr. and Mrs. *Nail*, sold out, at different times, the whole of the 1,400*l.* Stock, and paid the Proceeds, amounting to 1,200*l.*, to *William Nail*, and he, in order to secure the repayment of that Sum, with Interest, signed an Agreement, dated the 19th of August 1819, by way of Equitable Mortgage to them of certain Leasehold Houses, but which proved to be an utterly insufficient Security; and, on the 11th of November 1822, *Nail* gave the Trustees a Warrant of Attorney for the same purpose, upon which Judgment was shortly afterwards entered up. In March 1823 *Nail* became Bankrupt, and *Hole* and *Barber* were chosen his Assignees; but he never obtained his Certificate. In March 1825, Mrs. *Nail* filed a Bill against the Trustees of her Settlement, the Assignees under the Commission, and her Husband, charging the Trustees with having committed a Breach of Trust in selling out the 1,400*l.* Stock, and praying that they might be decreed to transfer Stock of that amount, into Court, upon the Trusts of the Settlement, and that the Dividends might be paid to her during her Life, and that they might be decreed to assign the Securities for the 158*l.* to new Trustees to be appointed by the Court.

*The Trustees, in their Answer, stated that they had sold out [*557] the 1,400*l.* Stock, and paid the Proceeds to or on the account of Mr. and Mrs. *Nail*, in compliance with the directions of the latter; but they omitted to mention the Securities which they had taken for the same.

(a) There was no Limitation in default of Appointment.

1832.—*Nail v. Punter.*

In June 1828 the Cause was heard, and a Decree was made, directing (amongst other things) the Trustees to transfer the 1,400*l.* Stock into Court, and that an Account should be taken of all the Dividends which had, and would have accrued due upon it from the time it was transferred, by Mrs. *Nail*, to the Trustees, and of all Sums paid by them, to her or for her use. On the 16th of April 1829, the *Master* reported that 462*l.*, being Eleven Years' Dividends, had or would have accrued due on the Stock, from the time mentioned in the Decree, to the 5th of January 1829, and that the Trustees had paid, to her or for her use, Sums amounting to 196*l.* 9*s.* 1*d.*, which, being deducted from the 462*l.*, reduced the same to 265*l.* 10*s.* 11*d.*

The Trustees, not being able to transfer the whole of the Stock to the Accountant-general, transferred to him 700*l.* Stock, part thereof, and time was given to them to transfer the remainder. On the 31st of July 1829, Mrs. *Nail*, in exercise of the Power reserved to her by the Settlement, made her Will, and thereby directed the Trustees to transfer the 1,400*l.* Stock, with all Dividends accrued due thereon, to her Husband, and appointed him her Executor. On the 7th of December 1830, *Nail* proved the Will, and, on the 17th of the same Month, he filed a Bill of Revivor and Supplement against the Trustees and the Assignees, charging that the Will was a valid Execution of the Power, and that he, *by virtue of such*

[*558] *Will*, became and was entitled to the 1,400*l.* Stock, and that he was entitled, *as the legal Personal Representative of his late Wife, to have the Suit and Proceedings revived; and praying that the same might be revived, and that it might be declared that the Will was a good Execution of the Power, and that he, *thereby*, became and was entitled to the 1,400*l.* Stock, and that he might have the same Relief against the Defendants as his Wife would have had, if living.

The Trustees were prevailed upon to join with the Assignees in answering this Bill, and they, thereby, submitted that the Assignees were entitled to the 1,400*l.* Stock.

On the 12th of March 1831, *Nail* obtained an Order for the Trustees to transfer the remaining 700*l.* Stock into Court. On the 3d of June 1831, the Trustees obtained an Order for leave to put in a Supplemental Answer to the Bill of Revivor and Supplement, for the purpose of stating that *Nail* had received, or had the benefit of the Proceeds of the Stock, and had given them the before-mentioned Securities for the same (b). Accordingly, the Trustees put in a Supplemental Answer, and afterwards *Nail* amended the Bill of Revivor and Supplement, by charging, amongst other things,

(b) See *Nail v. Punter*, ante, Vol. IV. p. 474.

1832.—*Nail v. Panter.*

that the 1,400*l.* Stock was not sold out at the request of himself and his Wife, and that the Proceeds were not applied for their Benefit, but were applied, by the Trustees, for their own use : that he never entered into or signed the Agreement of the 19th of August 1819, and that the Trustees, in obtaining the second Warrant of Attorney, practised a Fraud upon him, and that, when he executed it, he was ignorant of its purport, and conceived that it was given for securing the payment of *cer- [*559]
tain Building Materials which the Trustees had furnished him with. The amended Bill prayed, in addition to what is before-mentioned, that the Warrant of Attorney might be set aside, and Satisfaction entered upon the Judgment obtained thereupon ; and, if necessary, that an Account might be taken of certain Dealings and Transactions, which *Nail* alleged had taken place between the Trustees and himself, in his trade of a Whitesmith, and otherwise.

The Trustees, in their Answer, denied the charges as to the selling out and the Application of the Proceeds of the Stock, and stated that it had been sold out, and the Proceeds applied as before-mentioned : they also denied the charges of Fraud in procuring the Warrant of Attorney ; and said that the Dealings and Transactions mentioned in the Bill, took place in the years 1818, 1819 and 1820 ; that, in October 1822, they sent to *Nail* an Account of the Application, for his Benefit, of the Monies arising from the Sale of the Stock, and of other Dealings and Transactions between them, from which it appeared that a Balance of 1,381*l.* was due to them ; and that *Nail*, approved of and agreed to the Account : that his Estate being utterly Insolvent and never likely to pay a Farthing, they had never made any Proof under his Commission : and they insisted that *Nail*, being an Uncertificated Bankrupt, had no right to institute the Revived and Supplemental Suit.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Barber*, for the Plaintiff:

The Plaintiff, notwithstanding his Bankruptcy, has a right to maintain this Suit as the Personal Representative *of his Wife. [*560] She may have Obligations to be satisfied, and the Plaintiff has a right to enforce the Demand made by his Bill, for the Benefit of her Creditors. He is the Legal Hand appointed, by his Wife, to receive the Fund. Against a Debt due from a Person in his Individual Capacity, a Sum due to him in his Representative Character, cannot be set off. The Debt arose from the Trustees lending, to the Plaintiff, his Wife's settled Property. It was a common Debt to all intents and purposes, and the Trustees ought to have proved it under the Commission. They cannot make it a subsisting Demand against the Bankrupt. The Fund does not belong to the Plaintiff, but is Property to be administered by him. The Defendants must file a

1832.—*Nail v. Punter.*

Cross Bill to assert their Rights, submitting to have the Accounts of the Testatrix's Debts taken.

Mr. *Girdlestone*, for the Defendants, the Assignees under the Commission, submitted that they were entitled to the Fund, after payment of Mrs. *Nail's* Debts.

Mr. *Pepys* and Mr. *Chandless*, for the Defendants *Ward* and *Punter* :

The Defence of the Trustees is that the Plaintiff is in Possession of the Fund which he is seeking to get from them. Mrs. *Nail* had only a Testamentary Power of Appointment ; and the Plaintiff sues, not as her Representative, but as her Appointee under the Settlement ; in short, he is now the Owner of the Fund. He borrowed the Stock of the Trustees, and gave them Securities which are worth nothing ; and he is now, in effect, asking for the identical Money which he has in his Pocket. *Nail*, not only consented to the Breach of Trust, but received the Trust-monies, [*561] and, therefore, he *cannot claim against the Trustees. They ought not to be compelled to pay the Fund twice over. *Brice v. Stokes* (c). This is, in effect, a Bill by a principal Debtor against his Sureties, to compel them to pay the Debt. If *Nail* had been solvent, he would have been bound to replace the Stock ; and whatever Equity would have bound him, binds his Assignees. *Cocker v. Qayle* (d). The Building Transactions were totally distinct from the Loan of the Stock. The Assignees cannot be in a better situation than *Nail* was ; if, at his Bankruptcy, he had no right to recover the Fund, they can have no right.

Mr. *Barber*, in reply, contended that the Plaintiff was, at all events, entitled to a Decree for an Account of the Dealings and Transactions, not relating to the Stock, which had taken place between him and the Trustees, as stated in the amended Bill.

The VICE CHANCELLOR :

No Case for an Account has yet been opened. With respect to the other point in the Cause, I do not think that I ought to order the Fund to be brought into Court. Mrs. *Nail* had only a Testamentary Power to appoint the Stock ; and the Trustees, with the concurrence of her Husband, disposed of the Fund, and lent to him the whole Amount, for which they took from him Securities which proved to be wholly insufficient, and he subsequently became Bankrupt, and has never obtained his Certificate. A Decree was made in a Suit in which Mrs. *Nail* was the Plaintiff, by which it was directed that the Trustees should replace the Stock. But part of it only was brought into Court. [*562] She then died, and, by her Will, her Husband became the *Owner of the Fund and her Executor. He then filed a Bill for the purpose of having the former Decree carried into full effect. The Defence made by

 1832.—*Nail v. Panter.*

the Trustees to that Bill, is that the Plaintiff has already, through the means of a Breach of Trust, received the whole benefit of the Fund, and that the Plaintiff's Title being as Appointee, it would be contrary to plain Justice that he, who has had the Money once, should have it a second Time. The circumstance that he was his Wife's Executor, does not vary the Case; for the Claim can only be sustained by the Appointee of the Fund.

If, however, it can be shown that there have been other Dealings and Transactions between the Parties, which might turn the Balance in favour of the Plaintiff, then an Account ought, I think, to be directed.

Feme Covert.—Appointment.—Debtor and Creditor.

A Woman entitled to a Sum of Stock, settled it, on her Marriage, for her separate use, for Life with power to her to appoint it by Will only, but no Trust was declared, in default of Appointment. After her Marriage she signed a Promissory Note, and then, by Will, appointed the Stock to her Husband. *Scinde*, that the Holder of the Note is not defeated thereby.

AFTER the Judgment had been given, it was stated, in reply to a Question put by his Honour, that no Trust was declared, by the Settlement, in default of Appointment.

The VICE-CHANCELLOR :

The Fund then remained the *Chose in Action* of Mrs. Nail, except so far as she might exhaust it by an Appointment: and, as it appears that she gave a Promissory Note for securing a Sum of Money (e), this Court would not hold that she could, by an exercise of her Power, though [563] it was merely Testamentary, defeat the Creditor under the Promissory Note.

The Cause must stand over until Monday next, in order that the Question as to the Right to the Account may be argued.

3d December.—*Probate Duty.*

A married Woman having a Testamentary Power to appoint a Fund, exercised it in favour of her Husband, and appointed him her Executor. Held that, if the Husband claimed the Fund as his Wife's Executor, he must pay Probate Duty on the Fund.

Sir E. Sugden, Mr. Knight and Mr. Barber :

The contents of the Answer are sufficient to entitle the Plaintiff to an Account. We have shown that there is a Debt which is payable out of the settled Fund. The Decree directed an Account to be taken of the Dividends of the Stock; and the Master found that a Balance of 265*l.* 10*s.*

(e) This Note was proved, *vid voce*, at the hearing. It was signed by both Mr. and Mrs. Nail.

1832.—*Nail v. Punter.*

11*d.* was due, to Mrs. *Nail*, in respect of them. That Sum was not subject to the Power, but is part of her Personal Estate.

Mr. *Pepys* and Mr. *Chandless* :

It is no where put in issue that *Nail* repaid the Trustees, by subsequent Transactions between them, the Money he received from the sale of the Stock. He does not ask for the Money, as Executor, but prays that his Wife's Will may be declared to be a valid execution of the Power. By the Settlement, the Dividends, as well as the Capital, were subject to Power.

[The *Vice-Chancellor* :—Might there not be Debts contracted by her, which her Creditors would be entitled to be paid out of the Trust-fund.]

That Case is not made. There is no allegation of any Creditor having a security for his Debt, except the one proved.

[*564] * [The *Vice-Chancellor* :—That Instrument appears to have been given by the Husband as well as the Wife, and it was in his possession. As the Debtor held it, it must be presumed to be satisfied.]

It appears, on looking at the Probate of the Will, that the stamp is not sufficient to cover the amount of the Trust-fund (*f*). On that account therefore, *Nail* is not entitled to ask that the Fund may be brought into Court. *Carr v. Roberts* (*g*).

Sir *E. Sugden*, in reply :

Where Property is settled by Deed, Probate duty is not payable on the Will that disposes of it (*h*).

The VICE CHANCELLOR :

I have read over the Pleadings in this Cause, and my opinion is that the Supplemental Bill ought to be dismissed with Costs.

On a former day I gave my opinion on the Plaintiff's right to have the Fund transferred into Court on the ground of his being beneficially entitled to it ; and I adhere to the opinion which I then expressed.

No Case is made, either on the Pleadings or by Evidence, which authorizes me to direct an Account of the Dealings and Transactions alleged to have taken place between the Plaintiff and the Trustees. And I cannot direct the Fund to be transferred into Court, on the ground that [*565] the Plaintiff may claim as Executor of his *Wife ; for, if he claims as Executor the Probate is not on a proper Stamp. It ought, in that case, to cover the whole amount of the Fund ; as the whole may be required to pay the Wife's Debts. Besides, the Plaintiff has not

(*f*) Stamp Duty had been paid as for Property under 200*l*.

(*g*) 2 Barn. and Adol. 905.

(*h*) But see *Palmer v. Whitmore*, ante, p. 178.

 1834.—*White v. Sayer.*

stated any Case by means of which the Court can direct an Account of the Debts of the Wife.

Bill dismissed with Costs

MILBURN *v.* LYSTER.

1832: 4th December.—*Practice.*

If the Eighth Day after Service of an Order *Nisi* for confirming a Report, is a Sunday, that Day is not to be reckoned.

On the 17th of November 1832, a Copy of an Order confirming the *Master's Report Nisi*, was served, by the Defendant, on the Plaintiff's Clerk in Court, by which the Plaintiff had Eight days after service of the Order, to show cause to the contrary. On the 24th, which was a Saturday, the Plaintiff filed Exceptions to the Report, and, on the same day, lodged a Petition at the Rolls, for an Order to set down the Exceptions for hearing. Sunday intervening, the Plaintiff could not get the Petition answered, and the Order for setting down the Exceptions drawn up and entered, until Monday the 26th of November; but, on that day he obtained the Order, and served Copies of it on the Defendant's Clerk in Court. On the same day, the Defendant obtained an Order to Confirm the Report absolute, which however was not drawn up, passed and entered till the 28th.

The Plaintiff now moved to discharge the Order for confirming the Report.

Mr. *Knight* and Mr. *Keene*, in support of the Motion.

*Mr. *Lovat contra*, cited *Bullock v. Edington (a)*. [*566]

The *Vice-Chancellor* ruled that, as the day on which the Eight days expired, was a Sunday, it ought not to be reckoned; and granted the Motion.

WHITE *v.* SAYER.

1832: 6th December.—*Supplemental Answer.—Defendant.*

Leave given to file a Supplemental Answer to correct a Mistake in the original Answer.

THE Bill alleged that the Defendant did not declare that he had purchased the Estate in question in the Cause, on behalf of another Party, till some

(a) *Ante*, Vol. I. p. 431; and see *Manners v. Bryan*, *ante*, p. 147; and 1 Myl. & Keen, 453.

1832—Read v. Blunt.

hours after the Sale. The Defendant, in his Answer, stated that he did not declare that he had made the Purchase on behalf of another Party, until *a year and a half* after the Sale. The Defendant now moved, upon an Affidavit deposing that the words, “a year and a half” were inserted, by mistake, for, “an hour and a half,” for leave to file a Supplemental Answer, to correct the mistake.

Mr. *Rudall*, in support of the Motion.

Mr. *Koe*, *contra* :

The Bill was filed in November 1829, and the Answer in April 1830. Both Parties went into Evidence. The Cause was in the Paper and called on to be heard in December 1831. One of the Parties married, and it was necessary to file a Supplemental Bill, and this Defendant was made a Party. He put in his Answer, but did not say a word as to his having made a mistake as to the time when he made the Declaration.

[*567] *The VICE CHANCELLOR :

It appears to me that it is a plain mistake, and I shall make the Order.

READ v. BLUNT.

1832: 6th December.—*Annuitant—Injunction—Executor.*

When an Annuity is secured by a Covenant and Warrant of Attorney, and all the Arrears have been paid, the Court will not restrain the Executors of the Grantor from paying his simple Contract Debts until they have set apart a Fund to answer the future Payments, unless a Case of past or probable Misapplication of Assets is made out.

THE Testator in this Cause had entered into a Covenant, with the Plaintiff, for securing to him an Annuity for his life, and had executed a Warrant of Attorney, as a further Security; but Judgment had not been entered up under it. The Bill prayed for an Account of the Testator's Assets, and that the Defendants, his Executors, might be ordered to set apart a sufficient part of the Assets, to answer the future payments of the Annuity, and that, in the mean time, they might be restrained from parting with any of the Assets, either to the Creditors or Legatees of the Testator.

Some of the Testator's simple Contract Debts remained unpaid, but the Annuity was not in arrear, and the Executors had a Balance in hand.

Mr. *Pepys* and Mr. *James Stewart*, for the Plaintiff now moved for the Injunction. They said that the Relief asked, was frequently granted in the Case of Legatees. *Slanning v. Style* (a).

(a) 3 P. W. 335. See Toller on Executors, 462.

 1832.—Kent v. Pickering.

Mr. *Knight* appeared for the Defendants ; but
The VICE-CHANCELLOR, without hearing him, said :

If there were anything like misapplication of Assets in this Case, that would be a reason for the Court interfering. The [*568] Executors may, by Law, the day before an Instalment of the Annuity becomes due, apply the whole of the Assets, to pay the simple Contract Debts. The Case of a Bond Creditor is different ; for, when the Condition of a Bond is broken, the whole penalty is due. Here no case has been made out of the probable misapplication of Assets ; and, certainly, none has been made out of past misapplication (*b*).

Motion refused, without Costs.

 JERNEGAN v. BAXTER.

1832 : 10th December.—Representation.

Semble, that where a Testator's Will is proved in a Prerogative Court, and his Executor's Will is proved in a Diocesan Court, the Executor of the Executor is not the Personal Representative of the Original Testator.

On the hearing of a Petition in this Cause,

Mr. *Hallitt*, for the Petitioner, referred to *Fowler v. Richards* (*a*), in which it was decided, by Sir *J. Leach*, M. R. that, when a Testator's Will is proved in the Prerogative Court of *Canterbury*, and the surviving Executor's Will is proved in a Diocesan Court, the Executor of the Executor is the Representative of the original Testator, and that it is not necessary that the second Will should be proved in the Prerogative Court.

The *Vice Chancellor* said that before he acted on that Case, he should direct a Case for the opinion of a Court of Law.

 *KENT v. PICKERING.

[*569]

1832 : 10th December. —*Debtor and Creditor*.—*Injunction*.—*Executor*.

After a Decree in a Creditor's Suit, the Court will restrain a Creditor of the Testator from proceeding at Law against the Assets, but not from proceeding against the Executors personally.

THIS was a Creditor's Suit. One of the Testator's Creditors, who was not a

(a) 5 Russ. 39.

(b) See *Hawkins v. Day*, 1 Amb. 160, Blunt's Edn. A full Note of the Judgment is contained in the Appendix, Vol. II. 603. See also *Simmons v. Bolland*, 3 Mer. 647.

1832.—Wheat v. Graham.

Party to the Suit, had recovered Judgment *de bonis Testatoris, et si non, de bonis propriis*, in an Action brought by him against the Defendants, the Executors. A Motion was now made, after Decree, for an Injunction to restrain him from taking out Execution on the Judgment.

Mr. Beames, in support of the Motion, cited *Clarke v. Lord Ormonde* (a); *Lord v. Wormleighton* (b); and *Dyer v. Kearsley* (c).

Mr. Knight and Mr. Dunn for the Creditors, cited *Hancocke v. Prowd* (d); *Terrewest v. Featherby* (e); and *Brook v. Skinner* (f).

The VICE CHANCELLOR:

Where there is a Decree for the Administration of the Assets of a Testator, the Court will interfere so far as may be necessary to give effect to its own Decree. But it will not interpose to protect the Executors from any liability to which they may have subjected themselves personally.

Injunction granted to restrain the Creditor from proceeding at Law, against the Assets of the Testator only (g).

[*570]

*WHEAT v. GRAHAM.

1832: 15th December.—*Defendant.—Contempt.*

The Master allowed Exceptions to an Answer for Insufficiency, and fixed a time for putting in a further Answer. After that Time expired, the Defendant moved for further Time. Motion refused; the Defendant being in Contempt under the 6th of Lord Lyndhurst's Orders.

THE Master had allowed Exceptions to the Answer, for Insufficiency, and had fixed a time for the Defendant to put in a further Answer, which had expired.

Mr. Jacob, for the Defendant, now moved that he might be allowed Three Weeks further time to put in his further Answer.

Mr. Knight, for the Plaintiff, said that the Defendant was in Contempt, by virtue of the Sixth of Lord Lyndhurst's Orders, and, therefore, was not entitled to make the Motion.

The VICE-CHANCELLOR:

The Defendant ought to have applied for further time, before the time fixed by the Master had expired. He is now in Contempt, and therefore, is not entitled to make the Application.

Motion refused

(a) Jac. 546.

(b) Ibid. 148.

(c) 2 Mer. 432, Note.

(d) 1 Saund. 336.

(e) 2 Mer. 480.

(f) Ibid. 481, Note.

(g) See *Fielden v. Fielden*, 1 Sim. & Sta. 255; and *Price v. Evans*, ante, Vol. IV p. 514.

1832.—In the Matter of Yordon's Charity.

*IN THE MATTER OF YORDON'S CHARITY.

[*571]

1832: 22d December.—*Charity.—Surplus Rents.*

Testator devised an Estate to the Fishmonger's Company, to buy and distribute 138 Quarters of Coals, or Money to buy Coals at 8d. per Quarter, amongst the Poor, and added that the Sum Total in Money for the 138 Quarters, at the Price aforesaid, amounted to 4l. 12s., and that, if the Coals could be bought for less, more should be given. The Testator then gave 40s. out of the Residue of the Rents, to the Company, for executing his Will, and directed that whatsoever remained, should be disposed of in repairing the Buildings on the Estate, and to the use of the Company; but, if they declined to perform his Will, then that the Estate should go to the Corporation of *London* for different charitable purposes. Held that, though the Rents had increased, the Company were not bound to distribute, either in Coals or in Money, more than to the Amount of 4l. 12s. yearly, and that they were entitled to the Surplus of the Rents.

HENRY YORDON, Citizen and Fishmonger, by his Will, dated the 15th of October 1468, gave to the Wardens of the Fishmonger's Company and their Successors, certain Messuages and Tenements in *Billiter-lane* and elsewhere, in the City of *London*; and, after directing them to make certain Payments out of the Rents, for the saying of Masses for his Soul, proceeded as follows: "And I will also that the aforesaid Wardens of the Commnalty of the Mystery of Fishmongers of the said City of *London* for the time being, yearly and for evermore, purvey, buy and deliver 138 Quarters of Coal, or else Money to buy with the same Coals unto the same number, after the Price of 8d. for every Quarter of the said Coals, to be delivered and disposed of by the Advice and Discretion of one good Man or two of every Parish wherein the said Coals shall be given and distributed." The Testator then directed the Coals to be distributed, in certain Proportions, amongst a specified number of poor Inhabitants of the Parishes mentioned in his Will, and then proceeded thus: "The Sum Total in Money for all the aforesaid 138 Quarters of Coals, after the foresaid Price of 8d. for every Quarter, amounteth to the Sum, yearly, of 4l. 12s.: the which Coals

unto the said whole Number, I will that they be given and distributed in the form abovesaid, yearly and for evermore, between [*572]

the Feast of Michaelmas and the Feast of Christmas next ensuing; and, if the said Coals be bought for less Price than is aforesaid, then I will there be delivered and given more Coals after the good Discretions of the Wardens of the said Craft of Fishmongers for the time being. And, furthermore, I will and pray that the Mayor of *London* for the time being, once in the year for evermore, have oversight and see that this my present last Will, at such time as shall be at his pleasure, be truly executed and performed in all things and by all things, according to all the whole Charge of the Disposition of this my said Will, by the Wardens of the Commonalty of the foresaid Mystery of Fishmongers; for which Oversight and Labour of the said

 1832.—In the Matter of Yordon's Charity.

Mayor in this Party by him to be had and done, I will that the Wardens of the same Mystery or Craft of Fishmongers for the time being, for evermore, pay to the same Mayor of *London* for the time being, yearly for evermore, taking upon him the said Oversight and Labour, for the execution of the Premises, 10*s.* sterling: also I will that the common Clerk of the said City for the time being, have, every year for evermore, to remember the Mayor of the said Charges, 3*s.* 4*d.* to be paid by the said Wardens of the Mystery of Fishmongers of *London*, and, of the Residue of the Money coming and to be taken of the said Rents yearly and for evermore, I will the same Wardens and their Successors, every year and for evermore, have, for their Labours in this part to be had, and for the executing of this my Will, 40*s.* sterling, that is to say, each of them 6*s.* 8*d.* And whatsoever leaveth over mispent of the said Residue, I will that it be disposed, yearly and [*573] for evermore, to the reparations, maintaining, upholding *and sustaining of the foresaid Rents, and to the most necessary and profitable use of the said Craft or Mystery of Fishmongers, whereof the whole Sum of the aforesaid Charges amounteth, yearly, to 17*l.* sterling. And, if the foresaid Wardens of the Commonalty of the said Craft of Fishmongers of the City of *London*, or their Successors for the time being, be forgetful, negligent or slow, and keep not nor fulfil all and singular the Charges of this my present Will and every parcel of them, in like Manner and Form as it is before written, at any time by the space of two whole years, so that warning thereof to them be given and made, by the Mayor of the City of *London* for the time being, by three times within and during the same two years, or else, if the said Wardens of Fishmongers suffer the said Tenements and Messuages with the Appurtenances, to fall in decay and feeble to the falling down by default of due Reparations, after like warning of two years by the said Mayor to them to be made for the same, I will and ordain, that then all the aforesaid Lands and Tenements, with the Appurtenances, in *Billiter-lane* and in the foresaid Parish of *St. Catherine Christchurch*, remain to the Mayor and Commonalty of the said City of *London* for the time being, and to their Successors for evermore, to the sustaining of *London Bridge* and of the Priests and Clerks of the Chapel of *St. Thomas* upon the same Bridge, to find a good honest Priest for ever there to sing in the said Chapel:” and he willed that the rest of the devised Premises should remain to the Abbess and Sisters of the House of Minoreesses, for certain Superstitious and Charitable Purposes.

The price of Coals having greatly increased, the Company had, [*574] for many years past, distributed amongst the *Poor of the specified Parishes, Sums amounting to 4*l.* 12*s.* instead of Coals. The

1832.—In the Matter of Yordon's Charity.

questions on the hearing of a Petition presented under Sir *Samuel Romilly's* Act, were, first, Whether the Company were not bound to distribute Coals only : second, Whether, if they had the option of distributing either Coals or Money, the 4*l.* 12*s.* ought not to be increased in the same proportion as the Rents of the Estate had increased.

Mr. *Pepys* and Mr. *Bethell*, in support of the Petition :

The Gift is a Gift of Coals, and not of the Money which is mentioned as the Price of them. In the distribution of the Gifts, the Testator refers to Coals only. He says : " The Sum Total, in Money, for all the foresaid 138 Quarters of Coals, after the foresaid price of 8*d.* for every Quarter, amounteth to the Sum, yearly, of 4*l.* 12*s.* ; the which Coals, unto the said whole number, I will that they be given and distributed in the form abovesaid, yearly and for evermore." This is a positive direction that the Coals should be given in form aforesaid, yearly for ever. All that is given to the Company, is what remains after fulfilling the preceding purposes, which were to purvey and deliver Coals. At the time when this Will was made, the price of every Article was fixed by a Standard, and the quality of it was designated by its standard price. Accordingly, this Testator intended that the Company should give Coals which were of the quality which was then designated as Eightpenny Coal.

The other question is whether the Charitable Gifts ought not to increase in proportion to the increase of the Rents. It was the Testator's intention to make a disposition to Charity, and nothing else. The surplus Rents were intended for the benefit of the poor *Members of the [575] Company. The Testator appoints Supervisors of his Charities, and makes Gifts to them for seeing his Will performed : and he provides, in his Will, for the Company not accepting the Gift. It is plain, therefore, that he did not intend them a Bounty, but to devote the whole of the Property to the charitable purposes mentioned in his Will. The consequence is that, the Rents having increased, the Charities ought to be augmented in the same proportion. *The Attorney-general v. The Cooper's Company* (a) ; *The Thetford School Case* (b) ; *The Attorney-general v. Arnold* (c).

Sir *E. Sugden* and Mr. *J. Romilly*, for the Fishmonger's Company.

The VICE-CHANCELLOR :

It is, I think, quite plain that this Testator meant to give the option, to the Fishmonger's Company, of either giving the Coals, or Sums of Money not exceeding 138 Eightpences, that is, 4*l.* 12*s.*, to the Poor. He has provided for the benefit of the Poor to this extent, namely, that, if the Coals were less in price than 8*d.* the Quarter, they should have a larger quantity

(a) 19 Ves. 157.

(b) 5 Rep. 130.

(c) Show. P. C. 22.

1833.—Pitt v. Bonner.

of them ; so that he intended they should have, at all events, up to the value of 4*l.* 12*s.* : but there is nothing in this Will that indicates an intention that the Poor should have more than 4*l.* 12*s.*

As to the second question, I cannot but consider that the Case has not been brought within the principle of *The Thetford School Case*, or *The Attorney-general v. Arnold*; because, in *The Thetford School Case*, [*576] the Land was of a given value, and the whole Amount was doled out, in specific Sums, to the different Charities. There was then a clear intention, on the part of the Testator, that, whatever might be the value of the Land, there should be that proportionate distribution of the Rents of the Land amongst the different Charities. In the Case of *The Attorney-general v. Arnold* there was an express dedication of the Estates to Charitable Uses ; and, although the Testator, when he came to execute his general intention, doled out Sums to the Amount of 120*l.* only, whereas the whole Revenue was 240*l.*, yet there was an express dedication of the whole to Charitable Uses. Now here, I think, the Testator did not mean that the whole of the Land should go to Charitable Uses ; but he meant that certain specified objects should receive definite Sums only, and that the Surplus, whatever it might be, should go to the Fishmonger's Company as a benefit to them. The Testator then directs that the Mayor of *London* should see that his Will was performed by the Wardens of the Company, and, if they neglected to comply with the directions of his Will, after warning given them three times in the space of two years, then that all the first-named Charities should cease, and the Estate should go to the Mayor and Commonalty of the City of *London*, for different charitable purposes. I am, therefore, of opinion that the Fishmonger's Company, as against the Poor of the Parishes amongst whom the 138 Quarters of Coals, or the Money to buy Coals, are directed to be distributed, are entitled to the Surplus Rents of the Estate beyond the 4*l.* 12*s.*, for their own purposes (*d*).

Petition dismissed with Costs.

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*PITT v. BONNER.

1833: 13th January.—*Practice*.

Order made in a Cause after the Bill had been dismissed, that the Receiver should pass his Accounts and pay the Balance to the Defendant.

THE Bill was filed, by a Purchaser against a Vendor, for a Specific Per-

(*d*) See *The Attorney-general v. The Skinners' Company*, post, p. 596.

 1833.—In re Bedford Charity.

formance of the Agreement between them. A Receiver of the Rents of the Estate had been appointed in the progress of the Suit. At the hearing, the Bill was dismissed with Costs. The Receiver having Monies in his hands, which belonged to the Defendant, the latter, *after the dismissal of the Bill*, presented a Petition in the Cause, praying that the Receiver might be ordered to pass his Accounts, and that what should be found due, might be paid to him, the Defendant. And the *Vice-Chancellor* made an Order accordingly.

Mr. *Knight* and Mr. *Koe* appeared for the Petitioner.

*IN THE MATTER OF THE BEDFORD CHARITY. [*578]

1833: 9th, 12th & 14th January.—*Charity.—Jurisdiction.*

By the *Bedford Charity Act*, the Trustees of the Charity, who are a Body Corporate, are empowered to remove the Master of the English School, for just and reasonable Cause: and it is provided that if any Trustee or Trustees should misdemean himself or themselves, in any manner relating to the Charity, it should be lawful for any Person to prefer a Petition to the *Lord Chancellor* against any such Trustee or Trustees, and with or without making all in any of the other Trustees parties thereto, if such Person should so think fit; and the *Lord Chancellor* is authorized to cause the Person or Persons against whom the Petition should be preferred, to be examined, in such manner as should be thought fit, for the discovery of the Truth of the Matter alleged against him. One of the Masters who had been dismissed by the Trustees, presented a Petition against them, complaining that he had been dismissed irregularly, and not for good and reasonable cause. Held that the Court had no jurisdiction to entertain the Petition.

KING EDWARD the 6th, by Letters Patent dated the 15th of August in the 6th year of his Reign, gave Licence to the Mayor and Corporation of *Bedford*, to found and establish a Free and Perpetual Grammar School in the Town of *Bedford*, for the Instruction of Children in Grammar, Literature and Good Manners, and Licence to the Warden and Fellows of New College, *Oxford*, to elect and admit the Master and Usher of the School, and, for good, just and reasonable Causes and Occasions, to change and remove them from time to time, and to elect and admit other fit Men in their Places, and also Licence to the Mayor and Corporation, to have, acquire and purchase Manors, Lands, &c., and other Possessions to the yearly Value of 40*l.* above all Charges and Reprises, in and to the Sustentation of the Master and Usher, and for the Continuance of the School for ever, and for the Marriage of poor Maidens of the said Town, and for nourishing and edu-

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cating poor Children there, and, also, for the distributing in Alms
 [*579] the *Residue of the Proceeds of the Premises to the Poor of the said Town for the time being.

By an Indenture dated the 22d day of April in the 8th year of the Reign of Queen *Elizabeth*, and made between the Mayor and Corporation of *Bedford*, of the one Part, and Sir *William Harpur* and *Alice* his Wife, of the other Part, after reciting the Letters Patent, it was witnessed that the Mayor and Corporation, for and towards the Erection of the said School, to be and have Continuance according to the form and effect of the Letters Patent, did thereby found and establish a Free and Perpetual School within the Town of *Bedford*, in a Messuage there, commonly called the Free-School House, which Sir *William Harpur* of late built, and the same School to be of one Master and one Usher, for ever to continue; and the Mayor and Corporation did thereby elect, and admit unto the Office of Master of the School, *Edmund Green*, and unto the Office of Usher of the said School, *Robert Elbone*; and Sir *William Harpur* and *Alice* his Wife, for the better Maintenance of the School, granted and enfeoffed, to the Mayor and Corporation, all that Messuage of the said Sir *William Harpur*, commonly called the School-House, and, also, 13 Acres and 1 Rood of Meadow Land in the Parish of *St. Andrew Holborn*, in the County of *Middlesex*, to hold the same for the Sustentation of the Master and Usher of the School, for the continuance of the School for ever, for the Marriage of poor Maids of the Town, and for poor Children there to be nourished and informed, according to the Form of the Letters Patent.

By an Act of 4 Geo. 3, the Mayor, Recorder, and Aldermen,
 [*580] and other Persons mentioned in the Act, *were declared to be Trustees for the Management of the Charity Estate and Charity, and for carrying into execution the Rules, Orders, and Directions mentioned in the Schedule thereto, and for other the Purposes therein mentioned.

By an Act of 33 Geo. 3, the before-mentioned Act was repealed; and it was enacted that the Lord Lieutenant and the Representatives in Parliament for the time being for the County and Town of *Bedford*, the Mayor, Recorder, Aldermen, Common Council, Bailiffs, Chamberlains, the Master and Usher of the Grammar-School, for the time being, and 18 Inhabitants of the Town, to be chosen in the manner therein mentioned, and their respective Successors, to be chosen in like manner, should, from and after the passing of the Act, be Trustees of the Estates and Premises belonging to the Charity, and should let and manage the same, and apply the Rents and Profits thereof, in such manner as by the Rules, Orders, and Directions contained in the Schedule thereto was directed.

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By an Act of the 7th Geo. 4, the former Acts were repealed, and, it was enacted that Persons answering the same Descriptions as those mentioned in the Act of the 33 Geo. 3, should be, for ever thereafter, Trustees of the Charity Estates, and should manage the same, and apply the Rents and Profits thereof in such manner as in the now stating Act, and by the Rules and Directions contained in the First Schedule thereto, was directed ; and, after providing that six of the 18 Inhabitants then appointed and thereafter to be appointed Trustees, should retire from the Trust at certain Periods, and that six other Inhabitants, who should have resided in the Town *for three Years next preceding, and should then be seised of a Freehold Estate, in the Town or County of *Bedford*, of the clear yearly Value of 20*l.*, or who should occupy a House, in the Town, of the yearly Rent of 20*l.*, should be elected, in their place, by a Ballot of the Inhabitants paying Scot and Lot ; it was enacted that no Act of the Trustees, or any of them, should be valid unless made or done at some Meeting to be held by virtue of the Act, except where the same was thereby otherwise directed ; and that all the Powers and Authorities by that Act granted to or vested in the Trustees, should be executed by the Major Part of them present at their respective Meetings to be holden by virtue of the Act, the number of Trustees present at such Meetings not being less than 13, and that the Trustees might, from time to time, make such additional Rules and Regulations for the Management of the Charity Estates and the Application of the Rents and Profits thereof, as should appear to them to be proper, so as every such additional Rule or Regulation should be consistent with and conformable to the Provisions of that Act and the Rules and Directions in the said First Schedule contained ; and that no Order, Rule or Regulation made by the Trustees at any Meeting, should be revoked or altered at any subsequent Meeting, without the concurrence of a greater Number of Trustees then actually present than the Number by whom such original Order was made, nor unless Notice of such intended Revocation or Alteration, signed by the Clerk to the Trustees, should have been given to each of the Trustees, resident within the Town of *Bedford*, seven Days at the least before the Day of such subsequent Meeting, and that the first Meeting of the Trustees should be held on the second Thursday next *after the passing of the Act, and on the [*581] first Thursday in every Month for ever thereafter, and that Meetings should be held oftener, if occasion should require, upon Notice thereof being given and published as therein mentioned. *Sect.* 11. And it was thereby further enacted that the Trustees for the time being should be incorporated by the Name of “The Trustees of the *Bedford* Charity.” *Sect.* 12. And that, if any of the Provisions, Rules, Directions or Consti-

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tutions in that Act or in the First Schedule thereunto annexed, contained, should, at any time thereafter, prove inconvenient or impracticable to be carried into Execution, or if any Doubts, Disputes, or Difficulties should arise, or whenever the Direction or Order of a Court of Equity should be deemed necessary, as to or for the Administration of the said Charity Estates, or the Application of the Rents, Issues, and Profits thereof, or touching the Construction of any of the Rules and Directions contained in the same Schedule, or to be made by the Trustees of the said Charity, assembled at any general Meeting, or the Major Part of them, in pursuance thereof, then and in any of the said cases, it should be lawful for the said Trustees for the time being, or any eight or more of them, to prefer a Petition or Petitions from time to time, as occasion might require, to the Lord Chancellor of *Great Britain*, or the Lord Keeper or the Lords Commissioners of the Great Seal of *Great Britain* in that behalf appointed, who were thereby authorized and directed to cause the same to be heard in a summary way, and such Order or Orders as the Court of Chancery should think fit to make therein, or upon the hearing thereof, should be observed and obeyed by, and be final and conclusive to all Persons [*588] whomsoever, *and the Costs and Expenses to be incurred by every such Petition should be paid out of the Rents and Profits of the said Charity Estate. *Sect. 14.*

Provided that in case any Trustees should, either whilst he or they continued to be, or after he or they should have ceased to be a Trustee or Trustees, misconduct himself or themselves in the Application of the Rents, Issues and Profits of the said Charity Estates, or any part thereof, or in the management of the same, or in the not duly accounting for what should come to his or their hands, or in the execution of any of the Trusts, Powers, and Authorities vested or to become vested in him or them by virtue of the Act, or should misdeemean himself or themselves in any manner whatsoever relating to the said Charity or the Estates thereof, then and in any of the said cases, it should be lawful for His Majesty's Attorney-general, and also any Person or Persons whomsoever, with the consent of His Majesty's Attorney-general, to prefer a Petition or Petitions from time to time, as occasion might require, to the Lord Chancellor of *Great Britain*, or the Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* in that behalf appointed, against any such Trustee or Trustees, either whilst he or they should continue to be, or after he or they should have ceased to be such Trustee or Trustees, and without making all or any of the other Trustees for the time being, or any other Person or Persons who had been a Trustee or Trustees, Parties thereto, if the said Attorney-general or such other Person or Persons as aforesaid, should so think fit; and the said Lord Chancellor, Lord Keeper, or Lords Commis-

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sioners, were thereby authorized and directed to cause the same to be heard in a summary way, and were *empowered to direct such [*584] Person or Persons against whom such Petition or Petitions should be preferred, to be examined, in such manner as should be thought fit, for the discovery of the truth of the Matter alleged against such Trustee or Trustees in such Petition or Petitions ; and such Order or Orders as the Court of Chancery should think fit to make therein or upon hearing thereof, should be observed and obeyed by such Person or Persons against whom such Petition or Petitions should be preferred, and be final and conclusive to all Persons whomsoever, and the same should and might be enforced by such process as any other Order or Orders of the said Court ; and the Costs and Expenses to be incurred by every such Petition or Application should be paid in such manner, by such Party or Parties, and out of such Fund, as the said Court should direct ; provided that (anything therein contained notwithstanding) the Trustees appointed or to be appointed under the Act, their Heirs, Executors, or Administrators, should also be liable to be sued by Action, Bill, Information, or otherwise, as any other Trustee and Trustees for Charitable Purposes were liable to be sued in Law or Equity. *Sect. 15.*

By the First Schedule to the Act, it was provided that the several Masters and Assistants of the English Schools, should, during the time they continued in Office, reside in such Houses as should be provided for them by the Trustees. And, after giving certain directions relating to the course of Instruction to be pursued in the Grammar School, and to the nomination and removal of the Master and Usher of that School by the Warden and Fellows of New College, it was provided that the Masters and Assistants in the English *Schools, should be continued in their respective Offi- [*585] ces until they should die, resign, or be removed, and that the Masters and Assistants of the same Schools should, as often as occasion should require, be nominated and appointed by the Trustees, and that *the Trustees* should, at all times, be at liberty to dismiss or remove, any such Master or Assistant, *for just and reasonable causes* ; and that all the Children of Inhabitants of the Town of *Bedford* whose place of Settlement should be in either of the Parishes of the Town, who should come to the Grammar School to be educated, should be instructed in Grammar and other useful Learning and good Manners, in such Manner; and subject to such Regulations as the Warden and Fellows of New College and the Trustees should direct, and that all the Children of such Inhabitants of the Town as aforesaid, who should come to any of the English Schools to be educated, should be instructed in such Manner as the Trustees should direct.

About Christmas 1820 Mr. *Matthiason* was appointed Assistant Master of the English School : and, for several years afterwards, his conduct was ap-

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proved of by the Trustees. But, on the 3d of March 1831, the Trustees held a Meeting, at which, in consequence of a Complaint having been made of the neglected state of the English School, they appointed a Committee, consisting of 13 of their Body, to examine into the state of that School. The Committee accordingly examined the Scholars, and, on the 2d of May 1831, reported that they were in a disgraceful state of Ignorance, owing to the gross negligence of their Instructors, and that no material Improvement could be reasonably expected so long as the School remained under the Management of the then Masters: that Visiting Committees, as [*586] well as General *Meetings of the Trustees had, again and again, remonstrated with the Masters, and expressed, in strong terms, their dissatisfaction with the state of the School, and recommended to them more zeal, energy and mutual co-operation, but in vain; and that it was the duty of the Trustees to examine whether there was any hope of effectual Improvement under the then Masters, and give them an opportunity of hearing and answering the Charges against them, before they were dismissed, if such severity should be found unavoidable.

At a Meeting of the Trustees held on the 2d of June 1831, the Report was read to the Masters of the English School, and they were allowed till the 15th, to return written Answers to it; and they were to be allowed to have access to, and make Extracts from the Report. The Answers of the Masters were delivered to the Trustees, at a Meeting held on the 16th of June, and were by them referred to the School Committee to report thereon. Mr. *Matthiason*, in his Answer, did not deny that the Scholars of the English School were in a state of Ignorance, but ascribed it, not to his own neglect, but to other Causes. At a Meeting of the Trustees held on the 25th of July 1831, the Report of the Committee and the Answers of the Masters having been read, the Trustees declared that the Head Master of the English School was not competent to be continued in his Office; and, on the 4th of August, they dismissed him, and afterwards appointed Mr. *Moore* to supply his place; but, after expressing their opinion that Mr. *Matthiason* had not exculpated himself from the Charges, and censuring him, they continued him, provisionally, in his office for six months longer, at the end of which time Mr. *Moore* was to report to the Trustees [*587] *as to his conduct in the School. Mr. *Moore* not being able to enter on the duties of his office till the 29th of September, the Trustees resolved that Mr. *Matthiason* and another Under Master should discharge the Duties of the School in the meantime. Mr. *Moore*, on entering on his Office, introduced a new method of managing the School, which had been tried with success at other large Schools. On the 5th of April 1832, Mr. *Moore* made his Report to the Trustees, in which he stated that

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he had not derived that advantage which he had a right to expect from Mr. *Matthiason's* assistance, and which the unfavourable state of the School so urgently required : that that Gentleman appeared to be deficient in the earnestness and zeal which were so essential to a Teacher : that the circumstances which led to his, Mr. *Moore's*, connexion with the School might perhaps have had the effect of discouraging Mr. *Matthiason* and of rendering his services less valuable than they were calculated to be if duly exerted, and that he could scarcely venture to hope that Mr. *Matthiason* would prove a sincere and cordial coadjutor : that, although a sense of duty compelled him thus to speak of Mr. *Matthiason*, he rejoiced to think that the Trustees had it in their power to place him in the Junior Commercial School, where his services might be very useful. This Report was taken into consideration at a Meeting of the Trustees on the 3d of May, when Mr. *Matthiason* was dismissed.

Mr. *Matthiason* presented a Petition under the Act of Parliament, in which he stated that, owing to the want of accommodation and inconvenience of the Buildings in which the English School had been carried on since 1828, and to the Trustees having ceased to give Prizes *to mer- [*588] itorious Boys, the discipline of the School could not be attained to in the same way as it had been : that the Examination which the Trustees had directed, had been conducted by a Select Committee only, and in the absence of the Master, and at the beginning of the Half Year, when all the Classes had been newly arranged : that the Report contained vague and general Charges against all the Masters generally, and not against them individually : that the Trustees had refused to hear them, and required them to reply, in writing, to those Charges : that he had been treated unfairly by Mr. *Moore* : that, in his Answers to the Charges on the 16th of June 1831, he had proved that he had exerted himself to the utmost, having regard to the difficulties imposed upon him : that, at a subsequent meeting of the Trustees on or about the 10th of August, when the Report of the Committee and his Answer thereto were brought before them, a Motion for his dismissal was negatived, which proved that he was considered to have fully answered the Charges : that, though he was in attendance on the 3d of May, the Trustees would not allow him to hear Mr. *Moore's* Report, or to have a Copy, or an opportunity of answering it ; that he had been dismissed without any previous Notice, without having been heard in reply to the Charges in the Report, and without any just or reasonable Causes. The Petition prayed that the Trustees of the *Bedford Charity*, as well in their Corporate capacity as individually, might be restrained from ejecting him from the House then in his occupation as Assistant Master of the English School, and from dismissing him from being such Master, and that he might be paid the Arrears of his Salary out of the Charity Estates.

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[*589] *The Attorney-general* (Sir *W. Horne*), Mr. *Knight* and Mr. *West*, in support of the Petition, said that, by the Act of Parliament, nothing could be done by the Trustees, except at a Meeting held pursuant to the Act, and that they could not delegate their authority to a Committee: that the Petitioner had not been heard in reply to the Charges brought against him, but was required to put in a written Answer, which was contrary both to sense and justice: that the Trustees would not have appointed the Petitioner to act as Head Master of the School until Mr. *Moore* arrived, unless they had completely acquitted and exculpated him: that Mr. *Moore*, though he reported unfavourably with respect to the Petitioner, as a Coadjutor in the new System which he had introduced into the School, yet admitted his talents and qualifications as a Teacher; and that the Report contained no Charges of specific Misconduct against the Petitioner, but only a vague Charge of want of energy and zeal.

Sir *Edward Sugden*, Mr. *Jacob* and Mr. *Stevens*, for the Trustees, contended, first, that the Petitioner had been dismissed regularly, and for just and reasonable cause.

The next question is, whether this Court has jurisdiction to entertain this Petition. It is presented under the 15th Section of the 7 Geo. 4, c. 29, and not under Sir *Samuel Romilly's* Act. In this Case there is only one Petitioner, whereas, under that Act, there must be two. The consideration of a Section in the 33 Geo. 3, precisely in the same words as this

Section, came before Lord *Eldon* in another Case of the *Bedford Charity* (a): and his Lordship was clearly of opinion that it did not apply to a Case of this description, where an Application is made touching a Corporation: nor to a Case where there is no allegation of Misconduct or Misdemeanor, but of something which, if true, would be an Error in judgment or an Excess of Authority on the part of the whole body. It is clear that this 15th Section applies to Persons who are to be examined upon Interrogatories. If any Trustee or Trustees misconduct himself or themselves, then there is to be an Application to this Court, by Petition, against such Trustee or Trustees: that means against Individuals misconducting themselves. If individual Misconduct is meant to be complained of in this Case, then the Petition ought to have been served upon the Individuals who unanimously, at the meeting of May 1832, dismissed the Petitioner. Lord *Eldon* says: "The question would be whether the next Clause (the 15th) was meant to apply to a Case where there had not been Misconduct or Misdemeanor in the Trustees, but where they acted erroneously, if you please, on doubts and difficulties which they felt with regard to the construction of the Act of Parliament. The terms

(a) 2 Swanst. 470.

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of that Clause contemplate acts, not of the body of Trustees, but of Individuals being Trustees. The language applies not to Corporate Bodies at all: I cannot examine them, and the usual process is not applicable." (b)

It was, therefore, the opinion of Lord *Eldon* that, under that Clause of the Act, a Petition against the Corporate Body could not be sustained. If the Parties having a right to dismiss the Petitioner, have dismissed "him in a mode that is irregular, and by an excess of Au- [*591] thority, the proper mode of proceeding is by *Mandamus*.

In *The Attorney-general v. The Corporation of Bedford* (c) (which was a Case relating to this Charity before the passing of the first Act of Parliament), the Warden and Fellows of New College had removed the Master of the Grammar School for Misbehaviour; but the Court refused to interfere. The Trustees stand in precisely the same situation with respect to the English School, as the Warden and Fellows of New College do with respect to the Grammar School.

The *Attorney-general*, in reply, contended that the Trustees were empowered, by the Act of Parliament, to remove the Masters of the English School, not at their arbitrary and uncontrolled will and pleasure, but for just and reasonable causes: That as the 15th Section of the Act contained the words, "Without making *all* or any of the other Trustees Parties thereto," and as it was admitted by the Trustees, that they had removed the Petitioner in exercise of a Power or Authority vested in them by the Act, therefore, under the 15th Section, he had a right to prefer a Petition to this Court, against the whole body of Trustees, in order to have it decided whether he had been removed regularly, and for just and reasonable causes.

The VICE-CHANCELLOR:

There are three Questions in this Case. 1st. Whether the Trustees, have, in substance, misconducted themselves, in the dismissal of Mr. *Matthiason* from his "Office of Second or Assistant Master [*592] in the English School. 2d. Whether the Trustees are not, by the Act of Parliament, appointed the sole Persons to judge what shall be a just and reasonable cause for dismissing a Master. 3d. Whether, having regard to the Provisions of the Act of Parliament which has regulated this Charity, this Court has any jurisdiction in this Case.

His *Honor* then stated the facts of the Case as they appeared by the Affidavits, and expressed it to be his opinion that the proceedings of the Trustees with respect to Mr. *Matthiason*, had been fair and regular, and that, according to Mr. *Moore's* Report, Mr. *Matthiason* was not a Person

(b) 2 Swanst. 523.

(c) 2 Vez. 505.

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who ought to have been reinstated in his Office, from which he had been virtually and substantially dismissed by the Resolution of the 22d of August, and that the Trustees could never reasonably have expected that the School could go on properly, under the Government of Mr. *Moore*, if, after the making of that Report, they had allowed Mr. *Matthiason* to continue the Second Master of the School; and therefore that the Trustees had just and reasonable cause for acting as they did on the 3d of May 1832.

His *Honor* then proceeded thus: With respect to the second Question, I think that the Act of Parliament meant that the Trustees, themselves, should be the sole Judges of what might be a just and reasonable Cause, for dismissing the Masters of the English School. It may be said, if that be the case, why are the words "just and reasonable Cause" introduced?

They were introduced because the Legislature meant to make a [*593] distinction between arbitrary conduct, and that which "proceeds upon reasonable grounds: and, when one considers that this body of Trustees consists of a vast number of Persons, exceeding 50, is it at all surprising that Parliament should declare that the Master should not be dismissed without just and reasonable Cause, and that a set of Persons so constituted as the Members of this Body are, should not, arbitrarily and without giving themselves an opportunity of considering whether there was a just and reasonable Cause, dismiss the Master. We have, however, a Judicial Decision upon this Question. By the Letters Patent of the 6th of Edward the Sixth, it was directed that the Warden and Fellows of New College should appoint the Master and Usher of the Grammar School, and for good, just and reasonable Causes and Occasions, change and remove them from time to time; and, in the Case of *The Attorney-general v. The Corporation of Bedford*, the very words themselves came before Lord *Hardwicke* for his decision. The Report of the Case is as follows: "New College in *Oxford* having, by a Charter, particular Powers given them as to the Grammar School at *Bedford*, such as the removing the Master for Misbehaviour, &c. As to anything of that kind, the Lord Chancellor thought it was too much for this Court to do anything, though they were not appointed General Visitors." The First Schedule to the Act, after giving Power to New College to change and remove the Masters of the Grammar School for just and reasonable Causes, goes on to declare that the Masters of the English School, (which had grown up as a sort of Accretion upon the Grammar School,) should be continued as they then were, but that the Trustees should, at all times, be at liberty to dismiss or remove them, for just and reasonable Causes. It is true that the Lan- [*594] guage is not exactly the same as "the Language used in the Letters Patent; but there is no essential difference. And my opin-

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ion is that the Legislature must have meant to give, by the words used in the Schedule, the same Power as was originally conferred by the words of the Letters Patent, and that, as they do, essentially, adopt the same words as to the Masters of the English School, they intended that the Trustees should have the same power of removing the Masters of that School for what was, in their opinion, just and reasonable Cause, as the Warden and Fellows of New College had with regard to the removal of the Master and Usher of the Grammar School. If that be so, then the Decision of Lord *Hardwicke*, decides this Question.

The third Question is whether, by the particular Section of this Act of Parliament which has been so much commented upon in this Case, and under which alone this Petition is presented, I have jurisdiction to hear it. The 14th Section has, clearly, nothing whatever to do with the present Case. That Section only provides for Cases in which the Trustees may require the direction of the Court. The 15th Section provides, "That in case any Trustee or Trustees shall misconduct himself or themselves, in the application of the Rents Issues and Profits of the said Charity Estates, or any part thereof, or in the management of the same, or in the not duly accounting for what shall come to his or their hands, or in the execution of any of the Trusts, Powers or Authorities vested or to become vested in him or them by virtue of this Act, or shall misdemean himself or themselves in any manner whatsoever relating to the said Charity or the Estates thereof, then, and in any of the said cases, it shall be lawful to and for His Majesty's Attorney-general, and also any Person or Persons with the Consent of His Majesty's Attorney-general, to prefer a Petition or Petitions." [*595] Now, if there had not been an opinion expressed by Lord *Eldon* upon the point, I should have thought it quite plain that it was never meant to give, by this Section, power, either to the Attorney general, or to any Person with his consent, to present a Petition calling in question the act of the whole body of Trustees, but only to provide for redress to be given in cases where some of the Trustees have misconducted themselves or were alleged to have done so. And, when I find that what was complained of in the Petition presented before Lord *Eldon* in 1818, was an act done by all the Trustees, namely a refusal to allow Jews to participate in the benefit of the Charity, and a Petition was presented under a Section which I have been assured corresponds, in terms, with the 15th Section of this Act, and which from the report of the Case appears to correspond with it; and, when I also find that Lord *Eldon* comments upon that Section, and expresses a strong inclination of Opinion that he has not jurisdiction under it, it is not too much for me to say that, upon the point of jurisdiction alone, I ought not to entertain

1833.—Attorney-General v. The Skinners' Company.

this Petition. But, if I had jurisdiction, I should dismiss this Petition, on the ground that the Petitioner has no substantial Cause of Complaint.

Petition dismissed with Costs.

[*596]

*THE KING OF SPAIN v. MENDIZABAL.

1833: 17th January.—*New Orders.*

The 17th Order does not apply to a Commission to examine Witnesses Abroad.

ON hearing a Motion in this Cause, in which Mr. *Wakefield* was Counsel, the *Vice-Chancellor* said that the 17th of Lord *Lyndhurst's* Orders, did not apply to a Commission to examine Witnesses Abroad, and that he had so decided on the 29th of December 1829.

THE ATTORNEY-GENERAL AT THE RELATION OF DR. T. KNOX, HEAD MASTER OF TONBRIDGE SCHOOL, INFORMANT, AND S. S. AUCHMUTY, A STUDENT OF BRAZEN-NOSE COLLEGE, OXFORD, PLAINTIFF;

And

THE MASTER, WARDENS AND COMMONALTY OF THE SKINNERS' COMPANY AND THE PRINCIPAL AND SCHOLARS OF BRAZEN-NOSE COLLEGE, DEFENDANTS.

1833: 18th and 19th January, 18th February and 30th April.—*Charity.—Surplus Rents.*

A. after reciting that he was instigated by Piety, for the sustentation of *Tonbridge School*, and of a Student in *Oxford*, granted Lands to the Skinners' Company, as Governors of the Possessions of the School (by which Title they had been then lately incorporated) to fulfil the Uses expressed in a Schedule to the Grant, and which directed them to make certain Payments to the Student, to the College at which he was to be placed for assisting the Company, as such Governors, in providing a Master for the School, to a Preacher for preaching, yearly, before the Company and exhorting them to be beneficial Maintainers of the School, and to certain poor Men of the Company. The Payments did not exhaust the Rents at the time of the Grant, and the Company, in A.'s lifetime and with his knowledge, applied the Surplus to their own use, and had ever since continued to do so. An information claiming the Surplus for the School, was dismissed.

THE Information and Bill stated that, long anterior to the [*597] Reign of King Edward the 6th, the Company of *Skinners of the City of *London* were incorporated under the Name of The Master, Wardens and Commonalty of the Guild or Fraternity of the Body of Christ of the Skinners of *London*, and that, previously to the year 1554, Sir *Andrew Judd*, Knight, founded a Free Grammar School in the Town of

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Tonbridge, in the County of *Kent*, and obtained, from King Edward the 6th, Letters Patent dated in the seventh year of his Reign, containing a Charter founding the School and a Licence to hold Lands, in Mortmain, of the yearly Value of 40*l.*, for the Support of the School; by which Letters Patent it was ordained that, for the better government of the Lands, Tenements, Rents, Revenues and other Things to be granted towards the Support of the School for continuance of the same, Sir *Andrew Judd* should, during his Life, be and be called Governor of the Possessions, Revenues and Goods of the School, and that, after his Death, the Master, Wardens and Commonalty of the Mystery of Skinners of *London* for the time being, should be and be called Governors of the Possessions, Revenues and Goods of the School commonly called and to be called, "The Free Grammar School of Sir *Andrew Judd*," and be incorporated under the Name of "The Governors of the Possessions, Revenues and Goods of the Free Grammar School of Sir *Andrew Judd*, Knight;" and that the Master, Wardens and Commonalty of the Company for the time being, should be Governors of the Possessions, Revenues and Goods of the School, and should have perpetual Succession, and, by the same Name, might be capable in Law to have and receive Lands, Tenements and Hereditaments of whatsoever kind, as well of His said Majesty, his Heirs or Successors, as of Sir *A. Judd*, his Heirs, Executors or Assigns, or of any other Person or Persons, in "like manner, in support of the School;" and that the [598] aforesaid Governors and their Successors should, from thenceforth, have a common Seal to serve for their Business concerning only the Premises and other Things expressed in the Letters Patent, and, by the Name of Governors of the Possessions, Revenues and Goods of the Free Grammar School of Sir *Andrew Judd*, Knight, should be able to plead and be impleaded, &c. concerning the Premises: and the Letters Patent invested the Company, as such Governors as aforesaid, with certain Powers for the due Management and Regulation of the School after the Decease of Sir *Andrew Judd*, and contained a License to them and their Successors to receive and purchase, towards the Support and Maintenance of the School, Lands and Hereditaments, provided they did not exceed the yearly Value of 40*l.*

The Information and Bill further stated that Sir *Andrew Judd*, under the authority of the Letters Patent, for the Maintenance and Support of the School, purchased divers Lands and Hereditaments, which were conveyed, by his Direction, to himself and one *Henry Fisher* as a Trustee for him, as Joint Tenants in Fee, and that Sir *Andrew Judd*, during his life, as such Governor as aforesaid, received the Rents and Profits thereof, and applied the same to the Maintenance and Support of the School: That *Henry Fisher*,

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being himself desirous to benefit the Town and Neighbourhood of *Tonbridge*, and to increase the Advantage and Revenues of the School, and being affected with other Pious and Charitable Intentions, in the 4th year of the reign of Queen Elizabeth, executed a Deed of Gift, dated the 4th of April in that year, to the Skinners' Company as such Governors of the School,

[*599] of certain Messuages and Hereditaments of which he was then seised in Fee, and which Deed was as follows: "To all good men, &c. *Henry Fisher* Citizen and Skinner of *London*, Merchant of the Staple, health in God everlasting. Know ye that I the aforesaid *Henry*, being instigated by Piety as well for the better Sustentation of the *Free Grammar School*, founded and erected by *Andrew Judd*, Knt. deceased, in the Town of *Tonbridge*, in the County of *Kent*, as for the Sustentation of one Student in the University of *Oxford*, have given, granted and, by this present Writing, have confirmed to the Master, Wardens and Commonalty of the Mystery of Skinners of *London*, Governors of the Possessions, Revenues and Goods of the *Free Grammar School* of *Andrew Judd*, Knt., in the Town of *Tonbridge*, in the County of *Kent*, all that my Messuage, with the Appurtenances, situate in the Parish of *St. Peter*, in *Gracious-street*, *London*, in a certain Alley called *Harrow-alley*, otherwise *Fisher's alley* (and four other Messuages in the same Alley, one of which was in his own occupation); and also all those four Tenements situate in the aforesaid Alley, in the separate Tenures of *M. F.*, *W. P.*, *T. C.*, and *T. B.*; and also all and singular my Messuages, Tenements and Hereditaments whatsoever in the said Parish of *St. Peter*, to have, enjoy and hold all the aforesaid Messuages, Tenements and Hereditaments, and all and singular other the Premises aforesaid, with the Appurtenances, to the aforesaid Master, Guardians and Commonalty of the aforesaid Mystery of Skinners of *London*, Governors as aforesaid, and to their Successors, to fulfil the Works, Uses and Intentions in a certain Schedule to these Presents annexed."—The Schedule referred to in the Deed, was in the following words: "The good Works, Uses and Intents proposed and intended, by *Henry Fisher*,

[*600] named in the Deed to this Schedule annexed, to be done, accomplished and performed for ever, with the Rents, Profits and Revenues of the Houses, Tenements and Hereditaments in the said Deed comprised, as followeth in this Schedule, that is to wit, first, whereas he the said *Henry* hath placed one *John Kneeland*, some time a Scholar in the School of *Tonbridge*, in the Deed mentioned, in the King's Hall-College of *Brazen-nose*, in the University of *Oxford*, the said *Henry Fisher* willetth and declareth that the said Master, Wardens and Commonalty in the said Deed named, shall, yearly during the Life of the said *Henry Fisher*, give and pay unto the said *John Wheland*, or to such other Scholar con-

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tinuing a Student in the said Hall or College which the said *Henry Fisher*, during his lifetime, shall name or appoint, the yearly sum of 53s. 4d., towards his Exhibition and finding there, and 13s. 4d. to the Tutor of the said *John Wheland*, or of such other Scholar as the said *Henry Fisher* during his life, shall so name or appoint as is aforesaid, and, after the decease of the said *Henry Fisher*, the said Master, Wardens and Commonalty and their Successors shall, yearly for ever, yield and pay unto a Scholar to be by them chosen and placed in the said Hall or College, out of the said School of *Tonbridge*, the like Sum of 53s. 4d., and the like Sum of 13s. 4d., yearly, to his Tutor, and shall also, yearly for ever, pay and yield unto the Principal and Scholars of the same Hall or College of Brazen-nose, 33s. 4d., to the end they may be good to such Scholar as shall be there from time to time found and placed as is before expressed, and to the end they may be aiding and assisting, to the said Master, Wardens and Commonalty, Governors aforesaid, and to their Successors, in choosing and providing a meet and convenient Schoolmaster and Usher to the said School, when need shall require and *they thereunto re- [*601] quested : also the said *Henry Fisher* doth further will and declare that the said Master, Wardens and Commonalty, Governors aforesaid, and their Successors shall, yearly for ever, at two several times in the Year, that is to wit, on the day of Election of the said Master, Wardens and Commonalty of the Company of Skinners, and on the day of the Election of the Yeomanry of the same Company, cause two Sermons to be made, in the Parish of *St. John-upon-Walbrooke*, in the City of *London*, before the same Company, by one good, learned and godly Preacher, to be yearly nominated and appointed by the said *Henry Fisher* during his Life, and afterwards, by the said Master and Wardens for ever ; which Preacher, for every Sermon there so to be made, shall have 10s. : also the said *Henry Fisher* further willeth and declareth that the said Preacher shall, from time to time in every such Sermon so to be made, move and exhort the said Company to quiet, virtue and concord, and to be favourable and beneficial Maintainers of the said *Free Grammar School* : And further, the said *Henry Fisher* willeth and declareth that the said Master, Wardens and Commonalty, Governors aforesaid, and their Successors shall permit and suffer *M. F.*, *W. P.*, *T. C.*, and *T. B.*, in the said Deed named, to have, occupy and enjoy their several Tenements in the said Deed mentioned, during their several Lives, paying, yearly for every of their said several Tenements, 6s. 8d. quarterly, and using and behaving themselves as honest and quiet Persons : and also the said *Henry Fisher* further willeth and declareth that, after the decease of any of the said Tenants, the said Master, Wardens, and Commonalty and their Successors, shall, from time to time,

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bestow the said Tenements upon such poor and decayed Men or
 [*602] Women of the said Company as, in their discretions, shall be
 thought meet and convenient, yielding and paying, yearly, such
 Rents quarterly as is before expressed and appointed to be paid by the
 said *M. F.*, *W. P.*, *T. C.*, and *T. B.*, and using and behaving themselves
 as aforesaid."

The Information and Bill further stated that *Fisher* survived Sir *Andrew Judd*, and, soon after the death of *Judd*, that is to say, in the fourth year of the reign of Queen Elizabeth, duly conveyed to the Company, the Hereditaments so purchased by *Judd* as aforesaid; and that the Company, upon the execution of *Fisher's* Deed of Gift, entered into possession and receipt of the Rents of the Hereditaments therein comprised, and applied the same in the manner directed, by *Fisher*, in the Deed and the Schedule thereto:—That, some time after the death of *Fisher*, and before the fourteenth year of Queen Elizabeth, *Andrew Fisher*, the Son and Heir of *Henry Fisher*, attempted to disturb the Company in their Title to and Possession of as well the Hereditaments comprised in the Deed of Gift, as the Premises purchased by Sir *Andrew Judd*, and to eject them from the possession thereof:—That, in order to confirm the Title of the Company to the Hereditaments, and to put an end to the Claim of *Andrew Fisher, the Company*, in the 14th year of the reign of Queen Elizabeth, applied for and obtained an Act of Parliament, intituled, "An Act for the better and further assurance of certain Lands and Tenements, &c. to the maintenance of the Free Grammar School of *Tonbridge*, in the County of *Kent*;" whereby, after reciting the Foundation of the School by Sir *Andrew Judd*, and the Letters Patent, and the Purchase of certain Hereditaments by

Judd, for the maintenance and sustenance of the Schoolmaster
 [*603] and Usher, and the conveyance to *Henry Fisher*, as a Trustee, and that, after the Death of *Judd*, *Henry Fisher*, for the performance of the Trusts in him reposed by *Judd*, in the 4th year of the reign of Queen Elizabeth, conveyed the Premises, together with other Lands and Hereditaments of his own, situate in the parish of *St. Peter*, in *Gracious-street* in *London*, unto the Skinners' Company, as well for the better Sustentation of the Free Grammar School, as for the Sustenance of one Student in the University of *Oxford*, which Conveyances and Assurances made by *Henry Fisher* were then, since the Death of *Henry Fisher*, somewhat discredited and impeached by an Indenture affirmed to be made on the 23d of January in the 3d year of the reign of Queen Elizabeth, between *Henry Fisher* of the one part, and the Bishop of *Ely* on the other part; therefore, for avoiding of all ambiguity and doubt which, at any time thereafter, might arise against the validity of the aforesaid Conveyances and Assurances by colour of the aforesaid Indenture, and for the further

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assurance of the Premises to the Company, *unto the Godly Uses, Intents and Purposes above expressed*, it was enacted that the Indenture should, from thenceforth, be void, and that all Lands and Hereditaments conveyed to the Company as aforesaid, should, from thenceforth, ever remain to them, *to the Godly Uses and Intents abovesaid*.

The Information and Bill further stated that, some time afterwards, and shortly before the 31st year of the reign of Queen Elizabeth, *Andrew Fisher* again attempted to impeach the Title of the Company, as such Trustees as aforesaid to the aforesaid Hereditaments, upon the ground of the misnaming of the Company; whereupon they applied for and obtained another Act *of [*604] Parliament, in the 31st year of Elizabeth, intituled, "An Act for the better Assurance of Lands and Tenements for the maintenance of the Free Grammar School of *Tonbridge*, in the County of *Kent*;" whereby, after reciting the foundation of the School, the Letters Patent, the Conveyances, by *Henry Fisher*, of the Hereditaments purchased by *Sir Andrew Judd*, and of his own Hereditaments, to the Company, and also reciting the before-mentioned Act of Parliament, and that *Andrew Fisher* had since endeavoured to impeach the said Conveyances by pretence of the misnaming of the true Corporation which should have taken the same: It was enacted that the name of the Incorporation of the Skinners of *London*, either to have, enjoy, or purchase, or to grant or convey to others, or to sue or be sued, from thenceforth for ever should be "The Master, Wardens and Commonalty of the Mystery of the Skinners of *London*," and by that name should, from thenceforth, be incorporate for ever; and that the right and true Name of the Incorporation made by the Letters Patent concerning the said Grammar-school, had been, was, and should be, "The Governors of the Possessions, Revenues, and Goods of the Free Grammar School of *Sir Andrew Judd*, Knight, in the Town of *Tonbridge*, in the County of *Kent*," and that all the Letters Patent, Deeds and Conveyances before mentioned, and the said Act of Parliament, should be, of and for all such Hereditaments as were conveyed to or for the School, good and effectual in Law to the Governors of the Possessions, Revenues and Goods of the School, to all intents and purposes, and that the said Master, Wardens and Commonalty should hold and enjoy, for ever, all Hereditaments conveyed, to the Corporation of the Skinners of *London*, by any, or intended to be *conveyed to them by the said *Henry Fisher*, by [*605] any name or names whatsoever, other than such Hereditaments as were conveyed or intended to be conveyed to or for the School; and that the Governors of the Possessions, Revenues and Goods of the School should hold and enjoy, for ever, all such Hereditaments as were conveyed or intended to be conveyed or assured to them, by any of the Letters Patent, Conveyances, or Act of Parliament before mentioned, by any name or names whatsoever, to or for the School.

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The Information and Bill further stated that, some time before the year 1678, the Skinners' Company having omitted to place, in the College, a Scholar elected from the School, the Principal and Scholars made application to the Company relative thereto, whereupon an Agreement was entered into, between them, under their Common Seals, that the Company, in consideration of the Arrears, should yearly pay, to the Scholar, the sum of 1*l.* 17*s.* 4*d.*, to the Tutor of such Scholar, the sum of 9*s.* 4*d.*, and to the Principal and Scholars, in addition to the Sums formerly given to them as aforesaid, the Sum of 1*l.* 3*s.* 4*d.*; and the Principal and Scholars, in consideration of the Premises, for ever discharged the Company from all demands touching the Arrears: That, from Midsummer 1708 till August 1724, the Company having again omitted to place a Scholar at the College, the Principal and Scholars again applied to them in relation thereto; whereupon an Agreement, dated 17th February 1730, was made between them, under their Com-

mon Seals, by which it was agreed that the Company should retain, for their own use, the arrears then remaining *unpaid to the Scholar and Tutor, and should, in lieu thereof, pay Interest for the same, at Three per Cent., for augmentation of the Payments to the Scholar and Tutor; and, in consideration thereof, the Principal and Scholars for ever acquitted the Company from all Demands touching the Arrears; and in 1762 and 1802 similar Agreements were made between the same Parties, whereby the Payments to the Scholar, Tutor and College respectively, became 1*l.* 9*s.* 6*d.*, 4*l.* 6*s.* 6*d.* and 2*l.* 16*s.* 8*d.*

The Information and Bill further stated that, in December 1829, the Plaintiff was elected from the School and placed at the College: That the Rents of the Hereditaments then vested in the Skinners' Company, as such Governors and Trustees as aforesaid, under *Fisher's* Deed of Gift, had very much increased, but, notwithstanding, the Company refused to increase the Plaintiff's Exhibition or the other Annual Payments directed to be made by them, and, notwithstanding the *general Purposes of Charity*, for the better Sustentation of the Free Grammar School and of the Scholar to be elected from thence to the University of *Oxford*, which *Fisher impressed on the Gift*, had applied the whole Rents beyond the several yearly Payments aforesaid, to their own private purposes: That the Company alleged that, *Fisher* having limited the Amount of the Annual Payments to be made out of the Rents of the Hereditaments given by him, those Hereditaments were vested in them, subject only to such Annual Payments. But the Plaintiff charged that *Fisher's* object was to benefit the Scholars of the School, and that the Company, as Governors of the School, should apply the Rents upon the particular *Trusts mentioned in the Schedule, and, generally, for the good of the School and the Scholar elected to *Oxford*.

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The Information and Bill prayed that it might be declared that the Hereditaments comprised in the Deed of Gift, were vested in the Company, and were held by them for Charitable Purposes only, and not for their own Use and Benefit; that the Rents ought to be applied in and towards the Sustentation, Exhibition and Finding of the Plaintiff, whilst he should continue to be a Student of Brazen nose College, and of the future Students there to be elected from the School, and for the other Purposes of Trust mentioned in the Schedule, and for the better Sustentation of the School; and that an Account might be taken of the Rents of the Hereditaments of the Gift of *Henry Fisher*, received by the Company, and that they might be declared to be answerable for the Misapplication thereof; and that it might be declared that the Payments to the Plaintiff, his Tutor and the College, ought to be increased, that it might be referred to the *Master* to settle the Amount of such Increase, and to inquire into all the Charitable Purposes to which the Rents were applicable, and to settle a Plan for the future Application thereof.

The Skinners' Company, in their Answer, admitted that the Rents of the Hereditaments comprised in the Deed of Gift, had, from 1823, amounted to 1490*l.* 4*s.*: and they set forth an Extract from an old Book in their possession, (which they proved) containing an Account of their Receipts and Payments in respect of their Estates, and from which it appeared that, in the year 1563, which was in *Fisher's* lifetime, and the first year of their possession of the Hereditaments comprised in his [*608] Deed of Gift, the Rents of those Hereditaments amounted to 10*l.* 13*s.* 4*d.*; and they said the Surplus of the Rents of those Hereditaments, after making the Payments which they were directed to make thereout, were, in *Fisher's* Lifetime, retained by the Company, and applied by them, for the benefit of the Company, and, as they believed, with *Fisher's* knowledge and consent, he being a Member of the Company; and that all the Surplus Rents, from the time of making the Deed of Gift in *Fisher's* Lifetime, down to the present time, after making the Payments specified in the Schedule, had been applied by the Company for their general Purposes, and for the Relief of the poor and decayed Members thereof, which they submitted was according to the Intent of the Deed of Gift: and they submitted that there were no general purposes of Charity intended, by *Fisher*, for the better Sustentation of the School and of the Scholar to be elected from thence, other than the specific Payments limited by the Deed, which alone *Fisher* impressed upon his Gift, and that it was evident that *Fisher* intended that the Surplus Rents should belong to the Company as well for their Benefit generally as for the poor and decayed Members thereof, because, in his lifetime, there was a considerable Surplus of the Rents after

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making the Payments specified by the Deed, which was retained, by the Company, with his knowledge and consent.

The *Attorney-general* (Sir *W. Horne*) and Mr. *Randell* in support of the Information and Bill :

At the time when the Letters Patent were granted, the Skinners' Company were an existing Corporation, and were capable of acquiring Lands for their own benefit. If Sir *A. Judd* and *Fisher* had intended that the Company should take a beneficial interest in their Property, they would not have obtained Letters Patent for the purpose of erecting the Company into a new Body. The object of the Donors was to establish a School at *Tonbridge*; and, as *Judd*, during his Lifetime, was to be called Governor of the Possessions, Revenues and Goods of the School, so, after his Death, the Company were to be newly incorporated, and called Governors of the Possessions, Revenues and Goods of the School. The new Body, therefore, could not be intended to take Lands, except for the benefit of the School, and, accordingly, the Letters Patent authorize them to take Lands in support of the School only. *Fisher*, by his Deed of Gift, conveyed his Property to the Company, not as the Skinners' Company, but as the Governors of the Possessions, Revenues and Goods of the School, for the better Sustentation of the School, and of one Student in the University of *Oxford*. Having provided for the School, in the body of the Deed, as being his primary object, he points out, in the Schedule, the other purposes which are to be performed with the Rents, Profits and Revenues of his Property. The Schedule does not alter the Deed, except so far as it devotes some of the Rents to the purposes specified in it. One of those purposes was to provide a Preacher, who was to exhort the Company to be favourable and beneficial maintainers of the School. It is clear then that *Fisher* intended that the whole of the Rents, except so much as were subtracted by the Schedule, should be applied according to the Deed. No intention to benefit the Skinners' Company, appears in any part of the Deed or of the Schedule.

[*610] The Act of the 14th of Elizabeth is intituled, " An Act for the better and further Assurance of certain Lands, &c. to the Maintenance of the Free Grammar School at *Tonbridge* in the County of *Kent*." The Lands in question are part of the Lands on which that Act operates; and the Recitals of it identify the purposes for which *Fisher* conveyed his Lands, with the purposes for which he conveyed the Lands of which he was a Trustee for *Judd*. The recitals contain no mention of any Claim by the Company, for their own benefit; and, though that Act was applied for and obtained by the Company themselves, the only Uses and Intents for which the Lands are thereby confirmed to the Company, are the Sustentation of the

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School, and of one Student in the University of *Oxford*. The same observations may be made with respect to the Act of the 31st of Elizabeth. That Act draws, more distinctly than the Letters Patent had done, the Line between the old and the new Corporation. We submit, therefore, that it is as clear as language can make it, that *Fisher* dedicated the whole of the Property comprised in his Deed of Gift, to Charity; and, if, when he came to direct the purposes for which the Rents were to be applied, he did not exhaust them, the Court must direct a scheme for the future management of the Property. *The Attorney-general v. The Skinners' Company* (a); *The Attorney-general v. The Mayor of Bristol* (b); *The Attorney-general v. The Corporation of Coventry* (c); *The Attorney-general v. Arnold* (d); *The Attorney-general v. The Haberdashers' Company* (e). The School and the Student in the University, were not parties to the [*611] Agreements stated in the Information, and, therefore, cannot be affected by them.

Sir *E. Sugden* and Mr. *Lovat* for the Defendants, the Skinners' Company :

In order to show that the Skinners' Company are not entitled to the Surplus Rents for their own benefit, it must be made to appear, according to the Cases which have been decided on the subject, either that there is, on the face of *Fisher's* Deed, a clear intention to dedicate the whole of the Property comprised in it, to Charity, or that the Payments directed by him to be made, exhausted the whole of the Rents at the time. *The Attorney-general v. Mayor of Bristol* (f). A Gift for specific purposes, cannot carry with it more than is provided for those purposes. The enumeration of certain, particular objects and purposes, is, impliedly, and exclusion of the general intention. If *Fisher* had intended that the School should take the residue of the Rents, it would have been easy for him to have said so. Therefore he had no general intention to benefit the School. Nor did he intend the Student in the University, to have more than the Sum which he gave him. The 53s. 4d. are not given to him, for his Exhibition and Finding there, but towards his Exhibition and Finding there. The Founder has expressed his intention as to the purposes for which the Rents were to be applied, and this Court cannot go beyond those purposes. This Case then does not fall within the First Class of Cases. Nor does it range itself under the Second Class. *Fisher* knew, when he made the Gift, that the Rents amounted to 10l. 13s. 4d., and the Payments which he directed to

(a) 5 Madd. 173. See 206.

(c) 3 Madd. 353. See 358.

(e) 4 Bro. C. C. 163; S. C. 1 Ves. jun. 295.

(b) 2 Jac. & Walk. 294. See 315.

(d) Show. P. C. 22.

(f) See 2 J. & W. 317.

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be made, amounted to 6*l.* only, so that he must have known that
 [*612] there would *be a surplus. He lived for several years after he
 had executed the Deed, and saw, without objection, how the
 Rents were applied. In questions of this sort, contemporaneous usage is
 of great weight, and especially, where the Founder was alive at the time,
 and saw how the Rents were applied. One of the objects of the Founder,
 was to benefit the Corporation, which, at that time, was considered a God-
 ly and Pious use; and he has expressed an intention to benefit certain poor
 and decayed Men and Women of the Company. The direction, in the
 Schedule, that the Preacher should exhort the Company to be favourable
 and beneficial Maintainers of the School, is referrible to their being Trus-
 tees, for the School, of large Estates, independently of those comprised in
 the Deed of Gift. If the *Thetford School* Case were now to be decided,
 it would, according to what Lord Eldon says, in *The Attorney-general v.*
The Mayor of Bristol, be decided differently (g). Lastly, it was said
 that the Company could not take for their own benefit, as they had no Li-
 cence to hold in Mortmain: but that is a gratuitous assertion; for the
 Plaintiff cannot know what Licences the Company have; and, besides, the
 question is what was the Intention of the Founder when he executed the
 Deed.

Mr. *Bethell*, for Brazen-nose College.

The VICE-CHANCELLOR:

In this case, Mr. *Henry Fisher* executed a Conveyance, dated the 4th
 April in the 4th year of Queen Elizabeth, reciting that he was instigated
 by Piety as well for the better Sustentation of the Free Grammar School
 of Sir *Andrew Judd*, as for the Sustentation of a Student in the Universi-
 ty of *Oxford*, and he gave, granted and confirmed to the Mas-
 [*613] ter, Guardians, and *Commonalty of the Mystery of Skinners,
 in *London*, Governors of the Possessions, Revenues and Goods
 of the School, certain Tenements, which are particularly described, to have,
 hold and enjoy the same, to the Master, Guardians and Commonalty of the
 aforesaid Mystery of Skinners of *London*, Governors as aforesaid, and
 their Successors, to fulfil the Works, Uses and Intentions in a certain
 Schedule annexed thereto. It is observable that, by this Instrument, though
 he professes to be moved by Piety for the better Sustentation of the School,
 and also for the Sustentation of one Student in the University of *Oxford*,
 yet, in the same sentence, he grants the Tenements to the Master, Guar-
 dians and Commonalty of the Mystery of Skinners, Governors as aforesaid,
 to fulfil the Works, Uses and Intentions expressed in the Schedule. When

(g) See 2 J. & W. 307.

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we look at the Schedule, we find: "The good Works, Uses and Intents proposed and intended by *Henry Fisher*, named in the Deed to this Schedule annexed, to be done, accomplished and performed for ever, with the Rents, Profits and Revenues of the Houses, Tenements and Hereditaments in the said Deed indented comprised, as followeth in this Schedule (that is to wit.) [*His Honor* here read the Schedule. See page 599.]

This is the only Document that deserves any consideration for the purpose of deciding this Case, because the two subsequent Acts of Parliament do not, at all, vary any intention that is expressed in this Instrument, but merely have the effect of confirming the Grant, to the Master, Wardens and Commonalty of the Skinners' Company, (who were made, by the Letters Patent of Edward the 6th, the Governors of the Revenues and Possessions of the School,) just as it was made by *Fisher*.

"The Deed sets out with declaring that the Donor is moved by [*614] Piety for the better Sustentation of the School and for the Sustentation of one Scholar in the University of *Oxford*: but it is obvious, when we look at the Uses expressed in the Schedule, that he has carried his Intention beyond merely providing for the better Sustentation of the School and of the Scholar in the University, because, in the first place, he expressly directs that there should be a Payment made to the College as distinct from the Scholar, for the purpose that they may be good to the Scholar, and may assist the Governors of the School in the Election of a Master and Usher; and he directs, with respect to the Four Tenements which were held by the Tenants whose Names are mentioned, that they should be for ever bestowed upon such poor and decayed Men or Women of the Company, as, in the discretion of the Company, should be thought meet; so that there is a direct benefit given to the Company, by their being empowered to bestow these Tenements, at certain low Rents, upon decayed Men or Women of the Company.

It appears, by an old Book which was produced, that, at the time when this Grant was made, the Yearly Rents of the Tenements in question, amounted, altogether, to 10*l.* 13*s.* 4*d.*, and that the whole Sums of Money which were to be distributed, including the Four Annual Rents of 6*s.* 8*d.* only amounted to 7*l.* 6*s.* 8*d.*; therefore, there was, at the time when the Grant was made, a manifest Surplus; and it was contended, by this Information, that that Surplus was, in effect, given for a Charitable Purpose, and that the Charitable Purpose was the support of the Grammar School at *Tonbridge*. Now the Rule of Law is that, if it appears, upon the face of the Instrument, that the [*615] whole Rents of an Estate are given for Charitable Purposes, the subsequent Increase of the Rent beyond the Sums specified, shall be

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considered as devoted to the Charitable Purposes expressed ; and also if, without any such apportionment of the whole of the Rents of the Estate at the time when the Grant was made, there be, upon the face of the Instrument, an express Declaration that the whole Profits of the Estate shall be applied to Charitable Purposes, all the Profits, how much soever they may be increased at any future time, are applicable to those Charitable Purposes. But, in this Case, it is plain, from the account contained in the old Book, that there was no devotion of the whole of the Rents to Charitable Purposes: neither can it be collected, from the words of the Grant, that any such devotion was intended by the Donor. And, moreover, there has been a uniform Usage, from the time when the Grant was made, for the Skinners' Company to take to themselves, and apply to their own use, the Surplus of the Revenues beyond what would satisfy the several Sums making collectively the 6*l.*, and the Four small Sums which were the Rents at which the small Tenements were to be let to decayed Men and Women.

In the Case of *The Attorney-general v. The Mayor of Bristol*, Lord *Ellenborough*, speaking of what Lord *Coke* had laid down to be the Law in the *Thetford School Case*, says: "Unless I am mistaken, there are many Cases to be found, in both the Universities, where Land has been given of a greater value than the Amount of the Charges (which have been for Scholars, Exhibitioners, and so on) upon that Land, and where, in point of fact, [*616] the Enjoyment has been this: the Charges have been made *good from time to time, and the Surplus has been taken by the College itself; and, I believe, if this were considered an improper application of their Funds, it would have the effect of disturbing the Distribution of the Revenues of many of the Colleges in both Universities (*h*)."
And Lord *Holt*, in giving Judgment in *The Attorney-general v. The Mayor of Coventry*, says: "I do agree there is no Statute of Limitation shall bar a Charity; but, in a thing that is obscure and dark, and there hath been an Enjoyment for a long time, I think an Enjoyment for a long time, without Interruption, is a great Evidence of a Right; for quiet Enjoyment for a long time, does presume a rightful Enjoyment (*i*)."
Now we find, by the Deeds of Compromise which were successively entered into between Skinners' Company, as Guardians of the School, and Brazen-nose College, that the Payments which were appointed by *Fisher's Deed* not having been made for a long lapse of Years, the Skinners' Company entered into a Compromise with the College; and the Company, assuming to deal with the Surplus Rents as their own Property, contracted to pay, to the College, certain increased Sums, in respect of the past Arrears. That, therefore, manifestly, was a dealing between the Skin-

(*h*) See 2 Jac. & Walk. 317.

(*i*) See 3 Madd. 368.

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ners' Company and Brazen-nose College, in which, if there had been a pretence for saying that the whole Rents of the Estate given by *Fisher's Deed*, were to be applied to the Charitable Purposes, Brazen nose College might have said that they were entitled to a proportionate part of the Increase of the Revenues. But no such Right has ever been set up. And, therefore, though there was a Failure, on the part of the Skinners' Company, to pay, antecedently, to Brazen-nose College *what was really due, the Matter was settled between them, by the Skinners' Company giving to the College something which was not received before, and which they had not demanded.

When this Case was argued, as much as ingenuity would allow, was made of the fact that the Grant was made to the Skinners' Company, in their character of Governors of the Possessions and Revenues of *Tonbridge School*: but there is nothing substantial in that Argument. For some reason, which does not very clearly appear, but which, I suppose, was founded upon the particular state of the Times, it was thought necessary to give, to the then existing Corporation of the Skinners, a new Denomination in a Corporate character, whereby they should become the Governors of the Possessions and Revenues of the School; and, therefore, when *Fisher* intended to make a Conveyance for the Benefit, to any extent, of *Tonbridge School*, the Conveyance would, of course, be made to the Skinners' Company, as such Governors.

My Opinion is, that there is nothing which places this Case within the operation of the Rule laid down in the *Thetford School* Case, or within the operation of the Rule which was laid down in *The Attorney-General v. Arnold*: but I have the sanction of Lord *Eldon* in saying that long Enjoyment ought to protect this Body in the Possession of that which it has held uninterruptedly; and also of Lord *Holt*, who was of Opinion that, even where the Matter is obscure, long Enjoyment without Interruption, is great Evidence of a Right. In this Case, however, the Matter is not obscure, and the Skinners' Company have had long and uninterrupted Enjoyment; *and, consequently, the Information and Bill must be dismissed with Costs. [*618]

Dismiss the Information and Bill, with Costs. Declare that, according to the true Construction of the Deed of Gift and the Schedule thereto, and the said Acts of Parliament, the Skinners' Company are beneficially entitled to the Surplus Rents and Profits of the said Messuages, &c., after providing for the Payments directed to be made by *Fisher*, by the Deed of Gift and the Schedule (k).

(k) See *In re Jordan's Charity*, ante, 571.

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LOCK v. FOOTE.

LOCK v. COLE.

RICCARD v. COLE.

1833: 19th January.—*Will.—Revocation.—Recovery.*

A. devised Estates of which he had only the Equitable Fee, and, afterwards, agreed to sell Part of the Estates, and, to remove an Objection taken by the Purchaser but which was not well founded, he suffered a Recovery. Held that, though the Recovery was an Equitable one and the purpose for which it was suffered was expressly mentioned in the Deed declaring the Uses, and though the Limitations thereby made of the Property not intended to be sold, were precisely the same as before the Recovery, and were expressed to be in restoration and confirmation of them, the Will was revoked.

THE Bill stated that *Henry Foote* was, at the time of making his Will and of his Death, seised of certain Real Estates, and had power to appoint, by Will, certain other Real Estates; and that, by his Will dated the 31st of January 1805, and duly executed and attested, he confirmed to his Wife, *Honor Foote*, a certain Annuity or Yearly Rent-charge of 100*l.*, charged on and payable out of his Lands in *St. Clement's* therein mention-
 [*619] ed, to which she was entitled, during her Life, *under and by virtue of the Settlement therein mentioned: and he thereby gave, devised and appointed all his Messuages, Bartons, Farms, Lands, Tenements, Rents and Hereditaments whatsoever, and all Parts and Purparties thereof, situate in the several Parishes of *St. Clement's* and *Truro*, in the County of *Cornwall*, and of *Chulmleigh* and *South Molton*, in the County of *Devon*, and all other his Freehold Lands and Hereditaments whatsoever, to the Defendants, *John Thomas* and *William Karlake*, their Heirs and Assigns, to the Use of the said *J. Thomas* and *W. Karlake*, their Executors, Administrators and Assigns, for the term of 1,000 years next ensuing the day of his Death; and, from and after the expiration or other sooner determination of the said Term, and, in the meantime, subject thereto and to the said Annuity or Rent-charge so payable thereout as aforesaid, to the Use of the said *Honor Foote* and *Ann Meddon*, for their joint natural Lives, &c. &c.

The Bill further stated that, by Indentures of Lease and Release of the 23d and 24th of November 1807, the Release being made between *Henry Foote* and *Honor* his Wife, of the first part, *C. Marsh* and the said *W. Karlake*, of the second part, *John Burgess Karlake* and the said *J. Thomas*, of the third part, *Joseph King*, of the fourth part, and the said *William Karlake*, of the fifth part, after reciting that *Henry Foote* became Tenant in Tail in possession under the Will of *Henry Foote*, then late of *Lambesson*,

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in the County of *Cornwall* deceased, dated the 25th day of June 1755, of the Messuages and Hereditaments thereafter described and thereby released or otherwise assured; and that, by Indentures of Lease and Release of the 31st of May and 1st of June 1790, and by a Common Recovery, the *Messuages and Hereditaments first thereafter described, [*620] and thereby released, were, together with other Hereditaments since sold by *Henry Foote*, conveyed and assured to the use of *Henrs Foote*, for Life, with Remainder to the use of such Persons and for such Estates, and in such manner as *Henry Foote* should, by writing under his Hand and Seal duly executed, or by his last Will and Testament, devise, lease, release, convey or appoint, and, in default thereof, to the use of the Heirs of the Body of *Henry Foote*, with divers Remainders over; and that, by Indentures of Lease and Release of the 18th and 19th of Dec. 1795, the Release being made between *Henry Foote* of the first part, *Honor Marsh*, Spinster of the second part, *George Poole* and *Proctor Thomas* of the third part, *Cornelius Marsh* and *William Karlake*, of the fourth part, and *J. B. Karlake* the Elder and *John Thomas*, of the fifth part, (being the Settlement on the Marriage of *Henry Foote* with *Honor* his Wife, then *Honor Marsh*, Spinster), *Henry Foote* granted and conveyed unto the said *George Poole* and *Proctor Thomas*, their Heirs and Assigns, divers Messuages and Hereditaments therein described, and, amongst others, the Messuages and Hereditaments first thereafter mentioned and thereby released, To hold, unto the said *George Poole* and *Proctor Thomas* and their Heirs, to the use of *Henry Foote* and his Heirs until the Marriage, and, after the Solemnization thereof, to the use of *Henry Foote*, for Life, with Remainder to the use and intent that, after his Decease, *Honor Marsh* might receive, out of the said Hereditaments, an Annuity of 100*l.*, for her Jointure and in lieu of Dower and Thirds, with the usual powers of Distress and Entry for enforcing Payment of the Annuity, and, subject thereto, to the use of *Cornelius Marsh* and *William Karlake*, their Executors, *Administrators and Assigns, for a term of 99 [*621] Years from the death of *Henry Foote*, upon certain Trusts for better securing the Annuity, with Remainder to the use of *J. B. Karlake*, the Elder, and *John Thomas*, their Executors, Administrators and Assigns, for a term of 1,000 years, upon certain Trusts for raising Portions for the Children of the Marriage, with Remainder to the right Heirs of *Henry Foote*; and after further reciting that doubts had arisen whether the Indentures of Lease and Release of the 18th and 19th of December 1795, operated as an Appointment in exercise of the Power of *Henry Foote*, and that it was, on that account, deemed expedient that a Common Recovery should be suffered of the Hereditaments first thereafter described and released, and that *Foote* had agreed to sell the Messuage and Hereditaments

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thereinafter described to be in the occupation of *John Blight*, Innkeeper, and was desirous, and *Honor* his Wife, and (as far as they were interested), *Cornelius Marsh*, *William Karlake*, *John B. Karlake*, the elder, and *John Thomas* had consented that the said Messuage and Hereditaments should be exonerated from the Rent-charge of 100*l.* and from the Portions provided for the Children (if any there should be) of the Marriage, and that *Foote* had agreed to charge the Hereditaments secondly therein described and released, with the payment of the 100*l.* a year, and of the Portions, and that it was deemed advisable that, *for the purpose of accomplishing the said Arrangement and Agreement*, *Foote* should make the Appointment and Conveyance thereafter contained, and that he and his Wife should join in the Recovery thereafter agreed to be suffered, and that *Cornelius Marsh* and *William Karlake*, *John Burgess Karlake* the elder, and *John Thomas*, should Surrender the several

[*622] Residues of the said Terms in the Hereditaments agreed to be sold: It was witnessed that, in pursuance of the Agreement, *Foote*, in exercise of the Power reserved to him by the Indentures of the 31st of May and 1st of June 1790 and Common Recovery suffered in pursuance thereof, did appoint that the Messuages and Hereditaments first thereafter described and thereby released, should, thenceforth remain and be to the use of the said *Joseph King*, his Heirs and Assigns, subject to the Trusts and for the Purposes thereafter declared concerning the same: And it was further witnessed that, in further performance of the Agreement, *Henry Foote* and *Honor* his Wife, did release to *Joseph King*, his Heirs and Assigns, the Messuage called the *Red Lion Inn*, situate in the Borough of *Truro*, then in the occupation of *John Blight*, and all other the Messuages and Premises therein particularly mentioned and thereby described to be situate in the Parish of *St. Mary* in *Truro*, and all that Messuage situate in *Lenesyn-Street* in the Parish of *Kenwyn*, in *Cornwall*, and also the capital Messuage, Barton and Farm called *Lambesson*, together with the Tithes thereof, and the Lands and Tenements called *Parsingham*, and all other the Messuages and Premises therein described to be situate in the Parish of *St. Clement's* in the said County, and also all those Closes situate in *St. Clement's* aforesaid, and the Quay or Timber-yard situate in the said Parish, and all other the Messuages and Hereditaments of which *Foote* or any Person in Trust for him was seised, at Law or in Equity, for an Estate Tail in Possession, or of an Estate of Freehold in Possession with a remote Remainder in Tail, and which were situate in *St. Mary's* in *Truro*, *St. Clement's* and *Kenwyn* in *Cornwall*: To hold the

[*623] same unto and to the use of *Joseph King*, his Heirs and Assigns, to the Intent that he might be Tenant of the Freehold for

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suffering a Recovery thereof, which should enure, as to all those Messuages and Hereditaments thereinbefore described to be in the occupation of the said *John Blight*, with their Appurtenances, part of the said Estates and Premises, to the use of such Person, &c. as *Foote* should appoint, and, in default thereof, to the use of *Foote* for Life, with Remainder to the use of the said *William Karlake*, for the Life of, and in Trust for *Foote*, with Remainder to the use of *Foote*, his Heirs and Assigns; and, as to the capital Messuage, Barton and Farm called *Lambesson*, with the Tithes thereof, and the said Lands and Tenements called *Mansogne* otherwise *Manshogg*, other part thereof, to the use of *Foote* for Life, and with the same Power of Leasing as was contained in the Settlement of the 19th of December 1795, and, after the Decease of *Foote*, to the use and intent that his Wife might receive, out of the last-mentioned Messuages and Hereditaments, a Yearly Rent-charge of 100*l.* by way of *Restoration or Confirmation of, or Substitution for the like Yearly Rent-charge limited to her by the Settlement*, for her Jointure and in bar of Dower, and payable in like manner as aforesaid; and, after the Decease of *Foote*, and subject to the Rent-charge, to the use of *Cornelius Marsh* and *William Karlake* for 99 Years, by way of *Restoration and Confirmation of the Term of 99 Years so limited to their use as aforesaid*, and, after the determination of that Estate, to the use of the said *John Burgess Karlake* the elder, and *John Thomas*, their Executors, Administrators and Assigns, for the Term of 1,000 Years, by way of *Restoration and Confirmation of the Term of 1,000 Years so limited to their use as aforesaid*, and subject to the Terms of 99 Years and 1,000

*Years, to the use of *Foote*, his Heirs and Assigns: and, as to [*624] all other the Messuages and Hereditaments thereby released, to the use of *Foote*, his Heirs and Assigns: and it was declared that the Terms of 99 Years and 1,000 Years were created, respectively, for better securing the Annuity of 100*l.*, and for raising Portions for the Children of the said *Henry Foote* and his Wife, and to the intent that the Hereditaments therein comprised, might be a primary Fund for the Payment of the Rent-charge and Portions in the Settlement secured to be paid, without any Deduction whatsoever by reason that the Hereditaments thereinbefore limited to the use of *Henry Foote*, his Heirs, Appointees or Assigns, or some part thereof were or were to be exonerated from the payment thereof (a)

In Michaelmas Term 1807, a Recovery was suffered in pursuance of the last-mentioned Indenture.

The Testator died, without Issue, on the 25th of May 1822. His Co-

(a) The above is a correct Copy of the Deed of 1807, as it was set forth in the Briefs and in the Office-copy of the Decree.

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heirs contended that, by the Indentures and Recovery of 1807, his Will was revoked, as to the Hereditaments therein comprised. The Devisees insisted that those Indentures and Recovery did not, or ought not, under the circumstances of the Case, to be considered as amounting to a revocation of the Will (*b*).

Mr. *Pepys* and Mr. *Jacob*, for the Plaintiffs, who were interested under the Will :

[*625] Owing to the peculiar circumstances under which the Deeds and Recovery of 1807 were prepared and suffered, they did not revoke the Will. A Question was raised, on behalf of a Purchaser, whether the Release of 1795, operated as an execution of the Power contained in the Release of 1790, and the Deeds and Recovery of 1807, were prepared and suffered for the sole purpose of removing that Difficulty. The Release of 1807 recites that Doubts had arisen whether the Indentures of 1795, operated as an Appointment in exercise of the Power, and that, *on that account*, it was deemed expedient that the Recovery should be suffered. The intention of the Parties was not to better or alter the Estate, but merely to remove a doubt. By the Deeds of 1807, the Estates were appointed to the use of *King* in Fee, subject to the Trusts and for the purposes thereafter declared. The Limitations (except as to the part of the Estates) are precisely the same as were contained in the Deed of 1795, and the Terms of Years are expressed to be created, *by way of Restoration and Confirmation* of the Terms limited by the same Deed. There are some Cases in which a Recovery suffered, without reference to the Purpose for which it is suffered, will not revoke a Will. *Selwin v. Selwin* (*c*). In *Williams v. Owens* (*d*), it was held that the Conveyance in that Case, did not revoke the Will. The Conveyance and Recovery of 1807 were intended to have no effect, if, as was the case, the Deeds of 1795 operated as an Execution of the Power: the former were intended to carry the latter into effect, not to alter the Interests which any of the Parties had (except as to those parts of the Estates which were conveyed to *Foote*, to the usual uses to bar Dower); and, in point of fact, there was no alteration of

[*626] the Interests. *Foote* had an equitable Estate in Fee, and it was not intended to alter, but to confirm that Interest. If a Party having an Equitable Estate in Fee in *White-acre* and *Black-acre*, and, having occasion to suffer a Recovery of *White-acre* only, suffers a Recovery of both *White-acre* and *Black-acre*, but takes back precisely the same Estate in *Black-acre* as he had before, his Will is not revoked as to it. The strictness of the Law with respect to the Revocation of Wills, has been

(*b*) This Case is reported, as to another Question, *ante*, Vol. IV. p. 132.

(*c*) 1 Sir W. Black. 222, 251; S. C. 2 Burr. 1131.

(*d*) 2 Ves. jun. 595.

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gradually relaxed. If a Man having an Equitable Interest in Fee, devises it, and afterwards takes a Conveyance of the Legal Estate, to the same uses, it is no Revocation: and it makes no difference whether the Conveyance is made by an innocent Conveyance, as by Lease and Release, or by Fine and Recovery: those Assurances have not that destructive operation which they formerly had. So if, at the time of the Will, the Legal Estate is in *A.*, and it is afterwards transferred to *B.*, the Will is not affected; or if the Conveyance or Recovery be for a particular purpose, it is a Revocation *pro tanto* only. But if a Man having an Equitable Estate in Fee, devises it, and, afterwards, takes a Conveyance of the Legal Estate, his Will is revoked, if he takes an Estate differently qualified or modified, as, for instance, if he takes a Conveyance to uses to bar Dower, instead of in Fee, it is a Revocation. *Parson v. Freeman* (*e*). This proves that it is not the Conveyance, whether it be by Lease and Release, or by Fine or Recovery, but the different modification or qualification of the Interest, that has the effect of revoking the Will. In this Case the Equitable Fee was never out of the Testator between the times of making his Will, and of his Death; but, at both of those times, he had the same *Dominion, [*627] same extent of Interest and the same quantity of Estate. *Vawser v. Jeffery* (*f*). Lord *Eldon* thought that the Decision in *Williams v. Owens*, was not Law: but the ground on which his Lordship dissented from that Decision, does not apply to this Case. He says: "You cannot have a Legal Estate in Trust for yourself (*g*)."
The Ground of Lord *Eldon's* Dissent is an admission that, in our Case, there would be no Revocation. We have a right to consider the Recovery of 1807 as a mere Instrument of Transfer: what took place in that Year, was intended to have operation, only in case there had not been a valid Appointment by the Deed of 1795: and, as that Deed operated as a good Appointment, the Transaction of 1807 was not intended to have any operation at all. *Mathews v. Venables* (*h*); *Eilbeck v. Wood* (*i*). The Doctrine of Tenure does not come into operation in this Case, and, therefore, it affords no ground for holding that the Will was revoked.

Sir *E. Sugden* and Mr. *Wright*, for some of the Defendants, who were Devises under the Will:

Here we are not dealing with a Recovery of the Legal, but of the Equitable Estate. The Case of *Lord Greenville v. Blyth* (*k*), shows that the analogy between them does not hold in all respects. In several Cases, it

(*e*) *Persons v. Freeman*, 3 Atk. 740; see 748. See also Lord *Alvanley's* Observations on this Case, 2 Ves. jun. 599.

(*f*) 3 Russ. 479.

(*g*) See 8 Ves. 127.

(*h*) 2 Bling. 136.

(*i*) 1 Russ. 564.

(*k*) 16 Ves. 224.

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has been held that a Fine or a Recovery operates as an Execution, or a Confirmation of an Execution of a Power, where, in former times, they would have been held to destroy the Power. *Lord Leicester's* [*628] *Case (l)*; *Lord Jersey v. Deane (m)*; and *Tyrrell v. Marsh (n)*. The last Case went further than any prior Decision; for, there was no Intention expressed to limit the operation of the Fine and prevent the destruction of the Power, and yet the Court held that the Power was not destroyed, because it was clear, upon the whole of the Instruments taken together, that the intention of the Parties was, merely, to secure an Annuity. These Cases show that Fines and Recoveries have not the same destructive effect, against the intentions of the Parties, which they formerly had.

Mr. *Knight*, Mr. *Beames*, Mr. *Parker*, Mr. *Koe*, Mr. *Rolfe*, Mr. *Wood*, and Mr. *Courtenay*, appeared for the other Parties in the Cause.

The VICE CHANCELLOR :

I have always considered it as settled that every act which is a Revocation of a Will at Law, is a Revocation in Equity, except where the object of the Party, in doing the act, is merely to make a Security for payment of Debts, or where there is a dealing with the Legal Estate only, and except also in the Case of a Partition, in which last Case, if there is a change of the use, the Will will be revoked (o).

In this Case, if the Testator had been seised of the Legal Estate, at the time when he executed the Deeds and suffered the Recovery of 1807, his Will would have been revoked. I do not see how I can hold the

[*629] Recovery, in this Case, not to be a Revocation, without expressly over-ruling Lord *Eldon's* Decision in *Harmood v. Oglander*.

Declare that the Will of *Henry Foote*, deceased, the Testator in the Pleadings named, was revoked by the Indentures of the 23d and 24th of November 1807, and the Recovery suffered in pursuance thereof, so far as relates to the Estates comprised in the said Indentures and Recovery.

SWABY v. DICKON.

1833: 26th January.—*Receiver*.—*Costs*.

A Receiver having, without the Sanction of the Court, defended Actions arising out of a Distress for Rent made by him on a Tenant of the Estate, the Court refused to allow him his Costs of the Actions.

A PETITION presented by the Receiver in this Cause, stated that, in May

(l) 1 Vent. 278. See Sugd. Pow. 5th Edit. 66, *et seq.*

(m) 5 Barn. & Ald. 569.

(n) 3 Bing. 81.

(o) See *Luther v. Kidby*, 3 P. W. 169, Note; and *Tickner v. Tickner*, 3 Atk. 742, cited.

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1830, he was appointed Receiver of the real Estates of the Testator in the Cause: that, at the time of his Appointment, the Defendant *Hamer*, whose Wife was the Mother of the Infant Plaintiffs, and Administratrix of the Testator with his Will annexed, was in Possession of a Pasture, part of the Estates: that the Petitioner, soon after his Appointment, agreed, with *Hamer*, for his Occupation of the Pasture at a certain Rent: that, in April 1831, the Petitioner was under the necessity of distraining *Hamer's* Effects for a Year's Rent, which had been some time due, and the Goods distrained, consisting of Hay-stacks and other articles, were sold on the Premises, but the Purchasers were prevented from removing them, in consequence of the Gates of the Premises having been locked by *Foster*, a Servant of *Hamer's*, and by his Directions: that the Petitioner, assisted by the Sheriff's Officers, broke open the Locks, in doing which they were resisted by *Foster* and a number of Men armed with Staves; and, thereupon, *the [*630] Petitioner obtained a Warrant against them, and they were bound over, by two Magistrates, to keep the Peace, and to appear at the next Quarter Sessions, and the Petitioner was bound over to prosecute: that the Object of the Prosecution having been answered by the Purchasers being allowed to remove their Purchases without further Interruption, the Petitioner withdrew the Recognizance he had entered into, in doing which he incurred some Expenses in addition to those incurred in apprehending and binding over *Foster* and his Assistants: that, in Trinity Term 1832, four Actions were brought, arising out of the Distress, one by *Hamer*, against the Petitioner, and two other Actions, by him, against the Sheriff's Officers, for breaking open the Gates (in doing which the Petitioner had undertaken to indemnify them), and the fourth, by *Foster*, against the Magistrates, for false Imprisonment: that the Petitioner, by the Advice of his Counsel, defended *all* the Actions: that the Action against the Sheriff's Officers, was tried first, and *Hamer* was nonsuited, whereupon it was agreed, between the Parties and their Counsel, that a Juror should be withdrawn in the three other Actions, and that each Party should pay his own Costs: that the Petitioner was advised that, if he had succeeded in those Actions, he should have been unable to obtain any Costs from either *Hamer* or *Foster*. The Petition prayed that it might be referred to the *Master*, to tax the Costs, Charges and Expenses properly incurred, by him, in the Prosecution of *Foster* and his Assistants, and in defending the Actions, and that they might be allowed him in passing his Accounts, or that it might be referred to the *Master*, to inquire whether such Costs had been properly incurred and ought to be allowed, and, if he should so find, to tax and allow the same.

*Mr. *Knight* and Mr. *Cooper*, for the Petitioner.

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Sir *E. Sugden*, for the Plaintiffs.

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Mr. *Beames*, for the Defendant *Hamer*.

Mr. *Norton*, for the Defendant *Poppleton*.

The *Vice-Chancellor* expressed his disapprobation of the Conduct of the Receiver, in agreeing to let part of the Estates to Mr. *Hamer*, and, especially without the approbation of the *Master*, and in taking upon himself to defend the Actions without having previously applied, to the Court, to know whether he should be justified in defending them. His *Honor* added that was it improper in a Receiver or Guardian to do any acts which might involve the Estate in Expense, without first applying to the Court, and, if any such Application had been made in this Case, the Court would have prevented *Hamer* from proceeding in the Actions in which he was Plaintiff: that, as the Receiver had thought proper to defend the Actions, without having obtained the Sanction of the Court, he was not entitled to throw the Costs upon the Infants' Estates; and, if the Court were to direct the *Master* to inquire, according to the second alternative in the Prayer, whether the Costs had been properly incurred, it would be referring, to the *Master*, a Question of Law.

Petition dismissed with Costs, except as to the Defendant *Hamer*.

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**SADLER v. PRATT.*

1333: 29th January.—*Appointment.*

A Lady having Four Children by her first Husband, and Three by her second, and having power to appoint a Fund amongst the former only, appointed it amongst *all* her Children equally, and declared that, if her Children by her first Husband should refuse to share the Fund with her other Children, the whole Fund should go to her youngest Child by her first Husband. Held that the Appointment was not wholly void, but that the first Class of Children took, each, one Seventh of the Fund under it, and the other Shares went to them, as in default of Appointment.

By the Settlement on the Marriage of *James Sadler* with *Elizabeth Williams*, dated the 19th of May 1807, a Sum of Stock belonging to the Lady, was settled in Trust for her separate use, during her Life, and, after her Decease, in Trust for her Husband, for his Life, if he survived her, and, after the death of the Survivor, in Trust for all and every the Child or Children of the Marriage, or any such one or more of them exclusive of the rest, and in such Parts, Shares and Proportions and Manner, and at such Ages or Times, and subject to, with and under such Powers, Provisoos, Conditions and Dispositions, such Dispositions to be for the benefit of some one or more of such Children, as the intended Wife, by Deed or by her Will, should appoint; and, in default thereof, in Trust for the Children of the Marriage in

1833.—Sadler v. Pratt.

equal Shares, the Shares of Sons to be vested in them at 21, and the Shares of Daughters, at 21 or Marriage, which should first happen, and to be transferred to them at the same Ages or Times respectively, if the same should happen after the Decease of the Survivor of the Husband and Wife, but, if the same should happen during their joint Lives or the Life of the Survivor, then immediately after the Decease of the Survivor: And in case there should be no Child of the Marriage who should become entitled to the Fund under the Trusts aforesaid, then in Trust as therein mentioned.

There was Issue of the Marriage four Children, the Defendants *James H. C. Sadler, Albinia Sadler, William Braham Sadler*, [*633] and the Plaintiff, *H. H. Sadler*, the two last of whom were Infants.

James Sadler died in his Wife's Lifetime, and, after his Death she married the Defendant *William Golding Mayhew*; and there was Issue of that Marriage three Children, all of whom were Infants.

Elizabeth Mayhew, by her Will dated the 15th of September 1831, after reciting the Power of Appointment given to her by the Settlement, appointed the Fund to her Executor, in Trust for her Children by both Marriages, equally, and directed that they should receive their respective Shares at the Age of 25. And she declared that, in case any one of her Children by her first Husband, should object or refuse to share the Trust Property with her Children by her second Husband, the Child so refusing should not have any part of the Trust Property, and, in case all her Children by her first Husband should refuse, then she bequeathed the whole of the Trust Property to the Plaintiff, her youngest Child, by her first Husband, except 1,500*l.* which she bequeathed to her Daughter *Albinia Sadler*.

The Bill, which was Filed by *H. H. Sadler*, against his Brothers and Sisters by both Marriages, prayed that the Trusts of the Settlement and of the Will, so far as the same might, in the judgment of the Court, be a valid Appointment, might be carried into execution, and that the Rights and Interests of the Plaintiff and of the Defendants, might be ascertained and declared, and that the Fund might be secured.

Mr. *Knight* and Mr. *Jacob* for the Plaintiff, contended that, in case the previous Provisions of the Will failed, the Plaintiff [*634] would be entitled to the whole of the Trust-fund, subject to the Payment of 1,500*l.* to his Sister *Albinia*.

Mr. *Pepys* and Mr. *Monro*, for one of the Children of the first Marriage, said that the Appointment was wholly void, and, therefore, the Children of the first Marriage would take as in default of Appointment; but, if the Appointment was valid in any respect, the Condition annexed to it was clearly

 1833.—*Bushnan v. Morgan.*

void, as being in fraud of the Power, and, consequently, no right could arise through it to the Plaintiff. *Alexander v. Alexander* (a).

Mr. *Temple*, for another Child of the First Marriage, contended that the Appointment was good as to the Children of the First Marriage, and void as to the Children of the Second Marriage.

Sir *E. Sugden* and Mr. *G. Richards*, for the Children of the Second Marriage, disclaimed all Interest as Appointees.

Mr. *Tennant*, Mr. *E. Montague* and Mr. *Elderton* appeared for the other Parties.

The *Vice-Chancellor* said that the Appointment to the Four Children of the First Marriage was good, except as to the Time of Payment, which was too remote; and that the Appointment to the Children of the Second Marriage, was void.

Declare that the Defendants *James H. C. Sadler*, *Albinia* [*635] *Sadler*, *William B. Sadler*, and the Plaintiff *H. H. Sadler*, are entitled to one Seventh each of the Trust-Fund, under the Will or Testamentary Appointment of *Elizabeth Mayhew*; and that the said Will or Testamentary Appointment is void so far as the same purports to postpone the Payment of such Shares until the said several Parties attain the Age of Twenty-five Years; and that the said Will or Testamentary Appointment is not an effectual Appointment as to the other three Seventh Parts of the Trust-Fund; and that the Defendants *J. H. C. Sadler*, *Albinia Sadler* and *W. B. Sadler* and the Plaintiff, are entitled to such three Seventh Parts, under the Trusts of the Settlement, as being unappointed, and subject to all the Trusts and Provisions in the Settlement contained.

BUSHNAN v. MORGAN.

1833: 29th January and 14th February. *Interest.*

Interest is not payable on a Sum recovered, on a lost Policy, from a Life Insurance Company.

THE object of this Suit was to recover, from the Equitable Assurance Society, Sum of Money which was due on a Policy which had been effected on the Life of a Person deceased, but which had been lost. The *Master*, in pursuance of the Decree, had settled an Indemnity to be given by the Plaintiff to the Society: and, on the Cause coming on for Further Directions, the ques-

(a) 2 Vez. 640.

1833.—Carbonell v. Bessell.

tion was, whether Interest ought to be paid, by the Society, on the Sum insured, from the time at which it would have been payable under the Policy.

Mr. *Knight* and Mr. *Wigram*, for the Plaintiff, referred to *Tunstall v. Trappes* (a); and *Lowndes v. Collens* (b).

*Mr. *Pepys* and Mr. *Barber*, for the Defendants, cited *Hig-* [*636] *gins v. Sargent* (c); *Page v. Newman* (d); *Foster v. Weston* (e); *Hare v. Richards* (f): and said that, as the Court had directed the Plaintiff to give an Indemnity to the Society, the latter were justified in refusing to pay the Money secured by the Policy, until the Indemnity was given.

The VICE-CHANCELLOR:

I have consulted Mr. Justice *James Parke*, and he has informed me that it is not the habit of a Court of Law, in a Case like this, to give Interest on the Sum recovered: and, therefore, I think that I ought not, in this Case, to direct the Equitable Assurance Society to pay Interest.

CARBONELL v. BESSELL.

1832: 31st January.—Practice—Commission to examine Witnesses Abroad.

It is not necessary that the Affidavit in support of a Motion for a Commission to examine Witnesses Abroad, should state either the Names of the Witnesses, or the Matters to which they are to be examined, in a case where it is evident that such Examination is necessary.

MOTION, by Plaintiff, to extend the Common Injunction to stay the Trial of an Action brought, by the Defendant, against the Plaintiff, for the Freight of certain Vessels hired by the Plaintiff of the Defendant, and for a Commission to examine Witnesses at certain Places Abroad, which were named.

The Affidavit in support of the Motion, did not state the Names of the Witnesses, or the Facts as to which *the Plaintiff [*637] proposed to examine them, but merely that the matters stated in the Bill, and which constituted the Plaintiff's defence to the Action, occurred, and that the Persons who could prove them, resided at the Places named.

Mr. *Knight* and Mr. *Wakefield*, for the Plaintiff, said that though there was a dictum, by Sir *J. Leach*, Vice-Chancellor, in *Mendizabel v. Mochado* (a), that the Affidavit in support of a Motion for a Commission to examine Witnesses Abroad, must state their Names, and the Points as to which they

(a) *Ante*, Vol. III, p. 299.

(b) 17 Ves. 27.

(c) 2 Barn. & Cress. 348.

(d) 9 Barn. & Cress. 378.

(e) 6 Bing. 709.

(f) 7 Bing. 254.

(a) *Mendizabel v. Machado*, 2 Sim. & Sta. 453.

1833.—Carbonell v. Bessell.

were to be examined, yet Lord *Eldon*, on Appeal (*b*), had decided the contrary.

The *Attorney-general* (Sir *W. Horne*), Mr. *G. Richards* and Mr. *Heathfield*, for the Defendant, contended that the Affidavit ought to have stated both the Names of the Witnesses, and the Points to which the Plaintiff proposed to examine them; and that, if the Report of the Appeal from Sir *J. Leach*'s Decision, in *Mendizabel v. Machado*, were examined, it would be found that Lord *Eldon* had not overruled it. *Lousada v. Templer* (*c*); *Robinson v. Somes* (*d*): That, at all events, the Motion could not be granted, except upon the Plaintiff paying the Money sought to be recovered in the Action, into Court.

The VICE-CHANCELLOR, after having read the Bill and the Particulars of the Defendant's demand in the Action, said :

In *Mendizabel v. Machado*, the Affidavit in support of the Motion, upon which Sir *John Leach*, *Vice-Chancellor, pronounced the Order of the 9th of December 1825, did not (as I collect from the Report of that Case in 2 Russ.) state either the Names of the Witnesses, or the Points to which they were to be examined. Then, on the 9th of June 1826, a Motion was made to discharge that Order, not on the ground that the Witnesses were not named, but because the Points as to which they could give Evidence, were not stated in the Affidavits. By the Order of the 28th of April 1827, the Order of the 9th of June 1826, was rescinded, and the Order of the 9th of December 1825 was revived. Lord *Eldon*, therefore, did not require the Names of the Witnesses, or the Points to which they were to be examined, to be stated in the Affidavit; but his Lordship looked into the Case, as it appeared on the Pleadings, in order to see whether there were facts as to which it was necessary that Witnesses should be examined. Now, on looking at this Bill, and the particulars of the Defendant's demand in the Action, it is impossible not to see that there is an apparent necessity for examining Witnesses, as to the matters alleged, at all the places to which it is proposed that a Commission should go. I think, therefore, that, in this case, I am warranted in granting the Motion, although the Affidavit does not state either the Names of the Witnesses, or the Facts as to which it is intended to examine them.

(b) 2 Russ. 540.

(c) *Ibid* 561.

(d) 1 Youn. & Jer. 578.

1833.—Hardman v. Ellames.

BOOTH v. SMITH.

[*639]

1833: 1st and 4th February.—*Practice*.—*Scandal and Impertinence*.—*Bankrupt*.

Defendant, after putting in his Answer became Bankrupt. Plaintiff, before the Assignees were brought before the Court, obtained an Order to refer the Answer for Scandal and Impertinence. Held that the Order was regularly obtained.

THE Object of the Bill was to make the Defendant responsible for a Breach of Trust. After the Defendant had put in his Answer, a *Fiat* in Bankruptcy issued against him. The Plaintiff, before the Assignees were brought before the Court, obtained an Order for referring the Answer for Scandal and Impertinence.

Mr. *B. Anderdon*, for the Defendant, now moved to discharge that Order for Irregularity, on the ground that it had been obtained after the Bankruptcy, and before the Assignees were made Parties to the Suit. He said that, if the *Master* should find that the Answer was not scandalous or impertinent, the Bankrupt could not receive the Costs of the Reference; but that he would have to pay them, if the *Master* reported the Answer to be scandalous or impertinent. *Russell v. Sharp* (a); *Turner v. Robinson* (b); *Dod v. Herring* (c); *Boddy v. Kent* (d).

Mr. *Whitmarsh*, for the Plaintiff.

THE VICE-CHANCELLOR:

Bankruptcy is not an Abatement: it only renders the Suit imperfect.

This is an Application, against the Bankrupt, for something done by him personally; and, whether there is a Bankruptcy [*640] or not, the Plaintiff has a right to have the Answer made pure from Scandal and Impertinence. What may be done as to the Costs of the Reference, is another question. The *Master* may not, perhaps, be able to proceed until a Supplemental Bill is filed.

I cannot but think that the Proceeding is quite regular: what may be done under it, is another question.

Motion refused, with Costs to be paid by the Bankrupt.

HARDMAN v. ELLAMES.

1833: 11th Nov.—*Plea*.—*Pleading*.—*Adverse Possession*.

To a Bill claiming Title to an Estate, the Defendant pleaded that the Title of the Party

(a) 1 Ves. & Beam. 500.

(b) 1 Sim. & Stu. 3.

(c) *Ante*, Vol. III. p. 143.

(d) 1 Mer. 361.

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through whom the Plaintiff claimed, accrued in 1759, and that the Possession of the Estate had been, ever since, adverse to the Plaintiff and to the Persons through whom he claimed. Plea over-ruled, because it did not state particularly the Facts on which the Defendant meant to rely as constituting the Adverse Possession, and, therefore, the Plaintiff could not know what Case he had to meet.

A Plea of Adverse Possession, to a Bill charging that the Defendant has, in his custody, Documents showing the Plaintiff's Title, must be accompanied with an Answer denying that charge.

THE Bill stated that *John Hardman*, being seised or well entitled in Fee Simple, in possession, of or to one undivided Moiety of certain Estates in the County of *Lancaster*, by his Will duly executed and attested, and bearing date the 1st day of November 1754, devised his undivided Moiety of the Estates unto his first and other Sons successively in Tail, with Remainder to his Daughters as Tenants in Common in Tail, and, in default of such Issue, to his Executors, for the term of 99 years to commence upon his Decease, and, subject thereto, to his Nephew *John Hardman*, for Life, with Remainder to Trustees to preserve Contingent Remainders, with [*641] *Remainder to his Nephew's first and other Sons successively in Tail, with Remainder to his Nephew, *James Hardman*, for Life, with Remainder to Trustees to preserve Contingent Remainders, with Remainder to the first and other Sons of *James Hardman*, successively, in Tail, with Remainder to the Testator's own right Heirs: and the Testator declared the Trusts of the Term of 99 years to be for enabling his Nephews, and the other Persons to whom his Estates were successively devised, as they should become possessed thereof, to make Jointures for their Wives, and Provision for their younger Children; and that, in the mean time, the Term should be in Trust for the Person or Persons to whom the next and immediate Reversion, Remainder or Estate in the Premises should, from time to time, belong: And he appointed his Wife, *Jane Hardman*, and *Jane Hardman*, the Widow of his said late Brother *James Hardman*, and *James Percival*, Executors of his Will.

The Bill further stated that the Testator died about December 1755, without Issue, and that *Jane Hardman* the widow, and *Jane Hardman* the Sister, alone proved his Will, and entered into Possession or Receipt of the Rents of his Moiety of the Estates, as the Trustees of the Term, and continued in such Possession or Receipt during their Lives, claiming to hold the same for the Term: That they, or one of them, were or was, or claimed to be entitled to the other Moiety of the Estates by a distinct Title, and were, for many Years, in Possession or Receipt of the Rents of such other Moiety, and, from time to time, granted Leases of divers parts of the Estates, and, particularly, by an Indenture of the 8th of January 1756, they demised certain parts of [*642] the Estates to one *Harrison*, for 21 years at the *Rent of 240*l.*,

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and, in 1777, 1788 and 1794 they granted other Leases for 21 years of the same Premises, to certain Persons mentioned in the Bill: and, in or about 1794 *Jane Hardman* the Widow, having survived *Jane Hardman* the Sister, granted a Lease, of the same Premises, to one *Grace*, for 21 years, at the Rent of 400*l.*, and *Grace*, or his Undertenants, continued in Possession of the Premises, under that Lease, until 1815: That *Jane Hardman*, the Sister, died in or about 1793, and *Jane Hardman*, the Widow, in 1795, having appointed certain Persons, of whom *T. Earle* was the Survivor, her Executors, and they all proved her Will, and, as her Representatives, became possessed of the Testator's Moiety of the Estates, for the Residue of the Term of 99 years, and entered into Possession or Receipt of the Rents thereof, and *continued to receive such rents, or some part thereof, until some time after 1815*: that *T. Earle* died in or about 1822, having appointed the Defendants, *William Earle*, *Hardman Earle*, and *Richard Earle*, his Executors, and they proved his Will, and, thereby became his Representatives, and also the Representatives of *Jane Hardman*, the Widow and of *John Hardman*, the Testator, and that the Term of 99 years became and still was vested in them; that, some years ago, the Defendant *Ellames*, became, or alleged himself to be, in some manner, entitled to the Moiety of the Estates which did not belong to the Testator; and, some time after 1815, *Ellames* entered into the receipt of the Rents of the whole of the Estates, and was allowed, by the Representative of *Jane Hardman*, the Widow, to receive the whole thereof; and, *for some time after 1815, he accounted to them for a moiety of the Rents*, but, for some years past, he had retained the whole to his own use: that *Jane Hardman*, the Widow, and *Jane* **Hardman*, the Sister, during their Lives, applied the Rents of [*643] a Moiety of the Estates, or some parts thereof, according to the Trusts of the Term of 99 years; but, after the Death of *Jane Hardman*, the Widow, her Executors retained, in their own hands, the whole of the Rents received by them, as well as such part of the Rents received by *Jane Hardman* the Sister, as were not applied according to the Trusts, alleging that they were unable to discover the Persons entitled thereto under the Trusts of the Will; and that the Rents so unapplied, were still in the hands of the Defendants, the *Earles*, who admitted that they held the same as Trustees for the Persons entitled under the Trusts of the Will, but alleged that they could not take upon themselves to determine who was entitled thereto, without the Sanction and Indemnity of the Court: that the Testator did not leave any Issue, or any Brother or Sister, or any Issue of any Brother or Sister, except his Nephews *John* and *James*, who died Intestate and without Issue: That *Richard Hardman*, deceased, was Father of the Testator, and that *John Hardman* was the Brother of *Richard*, and the Uncle of the Testator, and that *John Hardman*, the Uncle, died, Intestate,

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in 1695, leaving *John Hardman*, his eldest Son and Heir, who died Intestate in or about September 1755, leaving *John Hardman* his eldest Son and Heir, who died, Intestate, in September 1786, leaving *John Hardman* his eldest Son and Heir, and the last-named *John Hardman* died Intestate in December 1822, leaving the Plaintiff his only Son and Heir, and, by the means aforesaid, the Plaintiff had become the Heir of the Testator; and that Letters of Administration to his Father and Grandfather, had been granted to him: that, as such Heir, and as such Personal Representative, *the Plaintiff was entitled to the undivided Moiety of the Estates which belonged to the Testator, and of the Rents arising therefrom, which were unapplied and were in the Hands of the Defendants, the *Earles*, and also to a Moiety of the Rents which had been received by the Defendant *Ellames*, and had not been accounted for by him to the Representatives of *Jane Hardman* the Widow.

The Bill then alleged that *Ellames* pretended that he purchased the Estates, for valuable Consideration, without notice of the Plaintiff's Title; but the Plaintiff charged that, if *Ellames* purchased the Estates, he had notice of the Testator's Will and of the Right of the Testator's right Heir under the Limitations therein contained, and that the Will was noticed in the Abstract of the Title of the Premises which was delivered to him on the occasion of his alleged Purchase, or in some of the Deeds mentioned in the Abstract, and was recited or referred to in the Deeds whereby the Premises were conveyed to him, and that, thereby or otherwise, he had notice of the Plaintiff's claim: That *Ellames* some times pretended that the Term of 99 years had been assigned to or in Trust for him: but the Plaintiff charged that, if the Term had been so assigned, *Ellames* had, at the time, notice of the Trusts declared of the Term by the Will. The Bill further charged that there were several outstanding Terms in the Estates, created prior to the Term of 99 years, which were then vested in Persons unknown to the Plaintiff; and, in case the Plaintiff should proceed, by Ejectment, to recover Possession of the said Moiety of the Estates, the Defendants threatened to set up the Term of 99 years and such other outstanding Terms, [*645] to defeat such Action: and that the *Defendants had, in their possession, Deeds and other Documents relating to the Estates, and the Title thereto, and the other Matters aforesaid, and showing the truth of such Matters, and, particularly, of the Matters before stated as to the Plaintiff's Pedigree, and that *Jane Hardman*, the Widow, and *Jane Hardman*, the Sister, retained Possession of the Estates under the Term of 99 years, and upon the Trusts thereof; and that many of such Documents would show the particulars of the outstanding Terms, and that the Plaintiff was the Heir-at-law of the Testator.

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The Bill prayed that it might be declared that the Plaintiff, as the Heir-at-Law of the Testator, was entitled to one undivided Moiety of the Estates, and that *Ellames*, might be decreed to deliver up the possession thereof to the Plaintiff, and to account, with him, for the Rents of the Moiety of the Estates which has been received by him, and that the Defendants, the *Earles*, might be decreed to account, with the Plaintiff, for the Rents, of the Moiety of the Estates, in their hands, and to assign; to him, the Term of 99 years; or that the Plaintiff might be at liberty to proceed, by Ejectment, for the recovery of the Moiety; and that the Defendants might be restrained from setting up the Term of 99 years and the other outstanding Terms; and for a Receiver of the Rents.

The Defendant, *Ellames*, by leave of the Court, put in the two following Pleas to the Bill:

1st. That *John Hardman*, the Nephew, survived *James Hardman*, the Nephew, and died in March 1759. And this Defendant avers that the Title, if any, of the Plaintiff, or of the Party through whom, [*646] by his Bill, he claims the Moiety of the Estate and Premises in respect of which he seeks relief by his Bill, accrued on the death of *John Hardman* the Nephew, and that the possession of the Moiety, and the receipt of the Rents thereof, have been adverse to the Plaintiff and the Persons through whom, by his Bill, he claims, ever since the death of *John Hardman* the Nephew.

2d. That the Legal Personal Representatives of *Jane Hardman*, the Widow, did not, nor did any of them, ever enter into possession or receipt of the Rents of the Moiety of the Estates comprised in the Term of 99 years, or any part thereof.

Sir *E. Sugden* and Mr. *Booth*, for the Defendant *Ellames* (a):

The first Plea states that the Title of the Plaintiff accrued on the death of *John Hardman*, the Nephew, in 1759, and that there has been adverse possession ever since. Leave to plead double was given in order to prevent an implication of continuing Trusts, which might have precluded adverse Possession. We deny the allegation in the Bill, that the Persons whose alleged Entry would have saved the time, ever were in Possession.

The House of Lords decided, in *Cholmondeley v. Clinton* (b), that, if Persons are receiving, for 20 years, that to which they are not entitled, that Receipt will be a bar. Then came the second Case of *Cholmondeley v. Clinton* (c), which was a Bill of Discovery to assist an [*647] Ejectment for other part of the Property. And Lord *Eldon* there.

(a) The Arguments and Judgment are reported *ex relations*.

(b) 4 Bligh, 1.

(c) 1 Turn. & Russ. 107.

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decided that, though a Party might have a right, at Law, to recover, he should have no assistance of any kind in Equity, after having allowed another Person to enjoy his rights for 20 years. In this Case we have had adverse possession of the Fee Simple since 1759, and there has been no Entry on the Term since 1795, when *Jane Hardman*, the Widow, died. It is not suggested that the Plaintiff could not have sooner sued. The Leases mentioned in the Bill apply to part only of the Estates.

Nothing more is requisite, in a Plea of Adverse Possession, than this Plea contains. It raises a material Issue, namely, the fact of Adverse Possession.

Mr. Knight and *Mr. Jacob*, for the Plaintiff:

Adverse Possession is a conclusion of Law deduced from facts, especially, where there has been a Trust. The Plea leaves the Court uncertain whether it means that all the Persons whom the Bill alleges to have been in Possession, were in Possession, but in such a way that the Defendant considers it to have been adverse to the Plaintiff, and not as Trustees; or whether it means that they were not in possession, but that he, the Defendant, was in Possession. Now he is bound to state which he means. *Jerrard v. Saunders* (d). The Term of 99 years is still subsisting; and the question is whether the Plaintiff is not entitled to Relief, in Equity, before the end of that Term. The Statement, in the Bill, that the Defendants, the *Earles*, admit that they hold the Rents in their hands, as Trustees for the [*648] Persons *entitled thereto under the Will, must be taken to be true. The Defendant does not aver that he is entitled to both Moieties of the Estate: and the Bill alleges that, for some time after 1815, the Defendant accounted, with the Representatives of *Jane Hardman*, the Widow, for a Moiety of the Rents. That allegation also must be taken to be true: it cannot, therefore, be said that the Defendant has acquired a Title, by Adverse Possession, to the whole. It is clear that he is accountable to our Trustees.

The Bill charges that the Defendant has, in his Custody, Deeds and other Documents, showing the truth of the Matters stated in the Bill. That charge ought to have been denied by Answer.

Sir E. Sugden, in reply:

If a Plaintiff states a Title in himself, and then goes on to charge certain facts as Evidence of his Title, the Defendant must, by Answer, negative those facts. But here the Plea of Adverse Possession since 1759, goes to the result of all the facts stated in the Bill. If, therefore, the Defendant had answered either the Allegation that the *Earles* had admitted that they had Rents in their hands, and that they held the same for the Persons enti-

(d) 2 Ves. jun. 187.

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tled under the Will, or the Allegation that *Ellames* had accounted for a Moiety of the Rents since 1815, he would have over-ruled his Plea. *Thring v. Edgar* (e), *Jermy v. Best* (f).

The VICE-CHANCELLOR :

I quite agree with the Defendant's Counsel, that it is not necessary, in order to make a Plea of Adverse *Possession perfect, ['649] that the Pleader should enter into a negative of the particular circumstances which the Plaintiff states in his Bill, for the purpose of showing that, with respect to him, there was not an Adverse Possession. That is quite consistent with the rule laid down in *Thring v. Edgar*. But the method here adopted of pleading Adverse Possession, is not proper ; because this Plea is not, strictly speaking, a negative Plea but when it states that there was an Adverse Possession, it means to have it understood that there was or were some Person or Persons in Possession, who may have been the Persons in Possession named in the Bill, or not any of those Persons, and that the Persons in Possession have held under such circumstances that their single Possession, or the collective Possession of all, was, altogether, an Adverse Possession. It is, I think, incumbent on a Defendant who means to plead an Adverse Possession, so as to state the circumstances that the Plaintiff may know what facts he is to prove, when he is afterwards required to meet the truth of the Plea. Now this Plea does not, at all, show what is the specific nature of the Case that the Defendant means to set up : and it is quite impossible for any Person to divine, from the statements of this Plea, which particular state of circumstances may be selected, by the Defendant, as constituting his Defence. I am of opinion, therefore, that this Plea is defective, not because it does not negative the circumstances that constitute the Plaintiff's Case ; for, if it did, that would over-rule the Plea ; but because it has so stated the nature of the Defence, that no human being can comprehend what that Defence is.

I am also of opinion that this Plea is defective, because it is not supported by an Answer with respect to *the collateral cir- ['650] cumstances charged by the Bill, that the Defendant is in possession of Deeds and Documents. For I apprehend that, according to the rule laid down in *Thring v. Edgar*, if a Person pleads a Plea of a negative kind, or, indeed, any Plea inconsistent with the Plaintiff's Case, he is bound to support it by Answer, so far as the Bill has charged any collateral matter. Thus, for example, when a Defendant pleads that he is a Purchaser for valuable Consideration without notice, to a Bill which has charged that he has in his possession certain Papers and Documents whence it will appear that his is not a Purchase without Notice, then, by the Rules of this Court,

(e) 2 Sim & Stu. 274.

(f) *Ante*, Vol. L. p. 373.

 1833.—Giblett and Others v. Hobson.

the Defendant is bound to support his Plea by an Answer as to that Charge. Now inasmuch as there is, in this Bill, a Charge that the Defendants have, in their possession, certain Deeds, Documents and Writings showing the truth of the matters stated in the Bill, my opinion is that, where a Defendant pleads such a Plea as that now before the Court, and gives no Answer to that Charge, his Plea is insufficient and must be over-ruled.

Upon the other Plea I do not suppose that the Defendant means seriously to insist. The Court has already, in the Case of another Defendant, decided against it; and that Plea also must be over-ruled.

[*651]

*GIBLETT AND OTHERS v. HOBSON.

1833: 11th November.—1834: 14th February and 11th November.—*Charity.—Mortmain.*

Testator bequeathed 5,000*l.* to a Charitable Institution towards building Almshouses. Testator, who was a Member of the Institution, knew that it was intended to build the Almshouses, and that a Piece of Land had been offered to and accepted by the Institution, for that purpose, but no Conveyance of the Land had been executed, though the Trustees were in possession, at the Testator's death; and, afterwards, the Land was duly conveyed to the Trustees. Held that the Bequest was void.

In October 1828, an Institution, or voluntary Association of Individuals, called, "The Butchers' Charitable Institution," was formed in the Metropolis, for affording Relief to decayed and distressed Master Butchers, their Widows and Children, and certain Rules and Regulations for the Government and Management thereof, were adopted and agreed to, by which it was provided, amongst other things, that the affairs of the Institution should be managed by a President, Vice-Presidents, Treasurer, Trustees and Committee. In 1829, it was proposed, by the Members of the Institution, that Almshouses should be erected for the use of the Pensioners of the Institution, and, in contemplation thereof, *John Knight*, one of the Plaintiffs, offered a piece of Land situate on *Farnham Common* in the County of *Bucks*, containing 3 A. 1 R. 37 P. for the erection of such Almshouses. At a Meeting of the Members of the Institution, held on the 9th of July 1829, it was resolved that *Knight's* offer should be accepted, and the thanks of the Meeting were voted to him; and various Sums were subscribed towards the erection of the Almshouses, and a Building Fund was thereupon formed; and, at subsequent Meetings, it was resolved that that Fund should be kept separate and distinct, and Rules were adopted for the regulation thereof. In January 1831, *Knight* sent the Title-deeds of the piece of Land (of which the Trustees of the In-

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stitution had been in receipt of the Rents from Midsummer 1829) to the Plaintiff *Giblett*, the President, and the same had since remained in the hands of the Treasurer; and a Conveyance of the Land [*652] was prepared, though the execution thereof was delayed in consequence of the Money subscribed not being sufficient to commence the Building of the Almshouses: but afterwards, by an Indenture of Bargain and Sale, dated the 28th of December 1831, and made between *Knight* of the one part, and the Plaintiffs *Fetherston*, *Butcher*, *Dexter* and *Gibbs* of the other part, and duly enrolled according to the Statute (9 Geo. 2, c. 36) the piece of Land was conveyed unto and to the use of *Fetherston*, *Butcher*, *Dexter*, and *Gibbs* in Fee, in Trust to receive and apply the Rents thereof as the Committee, or the major part of the Committee for time being, of the Building Fund of the Institution should direct, and, in the mean time, to apply the same, at the discretion of the Committee, in the erection or providing of Almshouses for the Pensioners of the Institution, and, afterwards, for the maintenance and support thereof, with a Power of Sale to be exercised at the request of the Committee.

John Jay Graves, who was a Member of the Institution, by his Will dated the 14th of June 1831, bequeathed as follows: "I give and bequeath, to the Butchers' Charitable Institution, the Sum of 5,000*l.* towards building Almshouses to the said Institution;" and he appointed the Defendants Executors of his Will.

On the 28th of November 1831, the Testator died.

The Bill was filed, in Michaelmas Term 1832, by the President, Vice-Presidents, Trustees, Treasurer and Members of the committee of the Institution, on behalf of themselves and the other Members, against the Executors of the Testator, for payment of the Legacy.

*The Answer submitted that the Bequest was void under the [*653] Statutes of Mortmain.

It appeared, by the Evidence, that the Testator became a Member of the Institution, in April 1829; and that, in July of that year, he was acquainted with the Resolutions respecting the Almshouses and Building Fund, and the offer of the Land made by *Knight*; and that he was incessantly urging the necessity of proceeding with the building of the Almshouses, without delay: and that, in a conversation which took place, in 1829, between him and one of the Witnesses, who was desirous of becoming a Pensioner of the Institution, the Testator mentioned *Knight's* offer, and added that he thought he should do something himself.

The Attorney-General, Sir *E. Sugden* and Mr. *Walker* for the Plaintiffs:

This Bequest, taken in connection with the possession of the piece of Land by the Society, is valid. In the earlier Cases, Lord *Hardwicke* decid-

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ed that a Bequest of Money, for erecting a Hospital or a School, was good. His Lordship considered that the word *erect* was equivalent to *found*, or *endow* (a). But *The Attorney-general v. Tyndall* (b) and other subsequent Cases, have gone this length, that a Gift to erect, is a Gift to purchase Land for the purpose of erection. The ground on which these Cases were decided, was that it was the Testator's intention that Land should be purchased with his Money. That such was the principle of the decision in

[*654] *The Attorney-general v. Tyndall*, appears from Mr. *Eden's* *Note to that Case, where the ground of the decision is stated. In this

Case, however, the Testator did not intend that Land should be purchased with his Money: he did not mean that the Charity should be completed with his Bounty; but he contemplated that the Almshouses would be erected on Land which had been already dedicated to Charitable Purposes. *The Attorney-general v. Parsons* (c) shows that the word *build*, implies, *primâ facie* only, purchasing Land; and Lord *Eldon* held that the Bequest, so far as it related to Additions or Improvements to be made upon the Land conveyed by the Testator, was good but that it was bad, so far as any Additions were to be made to the Ground, by acquiring other Land. In *The Attorney-general v. Williams* (d) a Gift to *establish* a School, was held to be valid. In *Foy v. Foy* (e) the Language was similar to the Language in this Case. It was a Gift *towards* erecting and endowing a Hospital in the County of *Dorset*; and it was held to be valid. In *The Attorney-general v. Nash* (f) the Testatrix gave the Residue of her Property to Trustees, in Trust to cause to be erected and built a Dwelling-house or Tenement to be appropriated for a Schoolhouse; and it appears, from the Judgment, that the ground of the Decision was that, taking the whole Will together, she intended that the whole Charity should emanate from her bounty. The Lord Chancellor concludes his Judgment in these words: "If Land were given, I think it clear the Executors could not keep back one Shilling of the Bequest from the maintenance of the Charity." In *Henshaw v. Atkinson* (g)

The Vice-Chancellor says: "It is next argued that it was this [*655] Testator's intention that the Charities were not to take effect until Lands or Buildings were supplied by others, and that the Money may be locked up for an indefinite period of time, and, therefore, that the Bequest cannot be sustained. The Cases of *Downing College*, and *The Attorney-general v. The Bishop of Chester*, seem to be Authorities against that objection." In *Johnston v. Swann* (h) a Bequest of a Sum of

(a) See *Vaughan v. Farrer*, 2 Vez. 183. *Cantwell v. Baker*, *ibid.* 185, cited; and *Attorney-General v. Bowles*, *ibid.* 547.

(b) 2 Eden, 207. See the Cases collected and observed upon in p. 214, Note.

(c) 3 Ves. 186.

(d) 4 Bro. C. C. 526.

(e) 1 Cox, 163.

(f) 3 Bro. C. C. 528.

(g) 2 Madd. 206.

(h) 3 Madd. 487.

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Money to be laid out in the Funds, and the Dividends to be applied in providing a Schoolhouse, was held to be good.

It is clear that the Testator did not mean the whole of this Charity to be effected by means of his Bounty. He uses the word *towards*, and we find that Land had been given, though not formally conveyed, to the Institution, and that a Fund was being formed for the purpose of erecting these Alms-houses. According to *The Attorney-general v. Parsons*, if there is an alternative in the Bequest which is valid, this Court will give effect to it. It cannot be doubted that the Application of this Money to Building on Land provided by others, would be a due execution of the Testator's intention. At the time when the Will was made, *Knight* (as the Testator knew) had dedicated this piece of Land to the Charity; and he was not at liberty to withdraw it; and he has since made a Conveyance of it to the Charity, in the manner required by the Statute of Mortmain; and thereby he has given effect to the former dedication of his Land. This Court, therefore, will consider it, as if, it had been formally dedicated to this Charity at the time of the Testator's death.

*Mr. *Knight*, and Mr. *James Russell*, for the Defendants: [*656]

There are two Questions in this Case: first, whether the Language of the Testator can be supported under the Statute of Mortmain; second, whether this Bequest, taken in connexion with the circumstances that have taken place, is valid.

A Bequest of Money to be applied for Building on Land for Charitable Purposes, where no Land in Mortmain is pointed out, is void. The question is has he pointed out, a purpose to be effected, and which can only be effected on Land. If there is Land in Mortmain at his death, unless that Land is clearly pointed out, the Bequest is void. *The Attorney-general v. Hyde* (i); *The Attorney-general v. Tyndall* (k). In *The Attorney-general v. Davies* (l), Lord *Eldon* says: "Whatever were the Decisions formerly, when Charity, in this Court, received more than fair consideration, it is now clearly established (and I am glad it is come back to some common sense) that, unless the Testator distinctly points to some Land already in Mortmain, the Court will understand him to mean that an interest in Land is to be purchased; and the Gift is not good." *Chapman v. Brown* (m). The question then here is whether there was Land in Mortmain at the death of the Testator. In this Testator's lifetime, *Knight* was not compellable to make a Conveyance of the Land to the Institution. The Bill alleges that the Charity were in possession of the Land: but it does not at all appear whether the Rents were applied *for the benefit of the Charity [*657]

(i) 2 Ambl. 751.

(k) 2 Eden, 207.

(l) 9 Ves. 544.

(m) 6 Ves. 404.

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or not. Before the Conveyance was made, the Charity had no Lien, either Legal or Equitable, on the Land. All that was done was an offer made and accepted. At the utmost, the Trustees held it from year to year only. Is then a Trust for building Almshouses, to be executed on Land held from year to year only? *Knight* might, on the day after the Testator's death, have changed his mind and resumed the Land. If *Knight* had died after the Bill was filed, the Conveyance would have been void, as the year had not elapsed. Extrinsic Evidence cannot be looked at to supply anything in a Will. The Bequest is void unless you find, in the Will, a reference to Land already in Mortmain. It cannot be referred to any Land unless the Will refers to it.

The *Attorney-general* in reply :

A Charity may have a Title to Land short of an absolute and indefeasible Estate in Fee Simple. *Ingleby v. Dobson* (n). If that be so, where is the Line to be drawn? The Title of this Charity to the piece of Land in question, was good against all Mankind, except the Donor, from the time when the Trustees of the Charity were first put into possession of it, and, by lapse of time, the Title of the Charity would have been good against the Donor. The Donor never revoked his Gift : and it is clear, from what he has done since, that he never intended to revoke it.

In the Cases cited, the Testator meant to be the Founder of a Charity, which had no previous existence. Here the Members of an existing Charity, are the Legatees.

[*658] *The VICE-CHANCELLOR :

In this Case a Bill is filed by Persons who represent a Charitable Society called "The Butchers' Charitable Institution;" which was formed by certain men of opulence in that business, for the Relief of the poorer Members of the Trade. In the year 1829 it was proposed that Almshouses should be built in which poor Members, who were to be relieved, should reside ; and a Person of the name of *Knight* offered to supply a piece of Ground for the purpose, and the Title-Deeds of that piece of Ground were sent by him to the Officers of the Institution, and some of whom were let into the receipt of the Rents and Profits of the Land. In the latter end of the year 1831, which was during the time when the Institution, by means of its Officers receiving Rents, were in the possession of the Land, but before there was any actual Conveyance made of the Land, a Person named *Graves*, who was himself, a Member of the Institution, made his Will, by which he gave in these words : " I give and bequeath, to the Butchers' Charitable Institution, the Sum of 5,000*l.* towards building Almshouses to the same Institution." After his Death, a Conveyance of Land was made according

(n) 4 Russ. 342.

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to the requisitions of the Statute of 9 Geo. 2, c. 36. And the Bill has been filed, against his Executors, for payment of the Legacy.

I confess that, at the hearing this Cause, I felt a very strong desire, in my own mind, to support, if I could, this Legacy : because it is perfectly clear that the Testator knew what was going forward ; and, where there is an intention clearly established, one naturally feels a reluctance at being obliged to disappoint it ; but upon looking into the Cases (which I have done from the "beginning"), I have come to the conclusion [*659] that I am not able to maintain this Legacy.

The early Cases were all discussed, by Sir William Grant, in the Case of *Chapman v. Brown* (o), in which he says : " Upon the principle established in the Case itself, it seems a little extraordinary that a Testator, having made no reference whatsoever to the case of Land being already in Mortmain, the Court should suppose an intention that he has not in the most remote degree pointed to." And then he says : " A Case directly in point occurred before Lord Northington in 1764, *Pelham v. Anderson* ; for there 2,000*l.* was given to build or erect an Hospital. That was determined by him to be void." Then came the Case of *The Attorney-general v. Hutchinson*, to which I have before alluded, in 1775, where the Bequest was, according to the Report in *Ambler*, " for the purpose of Erecting," and, according to a Note in *Brown*, " for erecting and building a Free School." A strong circumstance there, was, that there was, in the Parish, a piece of Ground in Mortmain, upon which a School had formerly been erected ; and it was contended that the fact was in the Testator's contemplation ; and the intention was to erect a School upon that Foundation : but Lord Bathurst thought that, as the Testator had not himself pointed to that intention, it was not to be presumed by the Court."

In the Case of *The Attorney-general v. Parsons* (p), Lord Eldon says : " I agree with the late Cases, which go a great way to establish that the Court cannot put such a construction upon the word *erect*, as was put upon that word in former Cases, and that, *primâ facie*, "the [*660] Testator must be taken to mean, by that word, that Land shall be bought ;" alluding to what Lord Hardwicke says in the Case of *The Attorney-general v. Bowles*, where he speaks of the word *Erect*, and refers to the word as implying not merely the fabrication of the Buildings, but the Endowing and Founding in that sense of a Hospital : " I think the good sense is with the later Cases, requiring that the Testator, himself, should have manifested his purpose to be sufficiently answered, if they could hire or beg Land, according to the expressions in the different Cases." Then his Lordship al-

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ludes to certain Cases, and says: "I am disposed to follow the later authorities, which are very numerous. In *The Attorney-general v. Nash*, though the Demurrer appears, in the Book, to be allowed without any reasons, I have reason to know Lord *Thurlow's* opinion was that, if a Testator directs a School to be built, and does not advert, himself, by words in his Will, to a purpose that the Land is to be acquired otherwise than by Purchase, you ought to infer that he meant it to be acquired by Purchase, and then it will not do."

In the Case of *The Attorney-general v. Davies*, which was first of all decided by Sir *W. Grant*, and then, on Appeal, by Lord *Eldon*, his Lordship says: "Whatever were the Decisions formerly, when Charity in this Court received more than fair consideration, it is now clearly established (and I am glad it is come back to some common sense), that, unless the Testator distinctly points to some Land already in Mortmain, the Court will understand him to mean that an interest in Land is to be purchased, and the Gift is not good." (q) When Lord *Eldon* says "understood to ['661] mean," he "means that the Testator will be understood so to mean, by a direction to build. Unless therefore I can collect, from the words which this Testator has used, something that points to what may be considered as the Land intended to be given, the Legacy cannot be supported.

But before I observe upon the words, I must, first of all, mention that the authorities which I have stated, are not, in my opinion, at all affected by what was decided by Sir *John Leach*, Vice-Chancellor, in the Case of *Johnston v. Swann*. Because, in that Case, the Testatrix had directed that the Interest of so much only of the larger Fund which she directed to be applied for Charitable Purposes, as should not exceed 600*l.*, should be applied for providing the School-house. It is perfectly obvious, therefore, that that direction never could be meant to be a direction to build, for there could only be an Annual Sum of 18*l.* applied. I mention that, because it does not appear, from the printed Report of the Judgment, that Sir *J. Leach* took notice of that fact; but His *Honor* seems to suppose that the Interest of the whole of the Fund was applicable; and the Marginal Note so treats it; whereas, in point of fact, it was only the Interest of so much of the Fund as should not exceed 600*l.* that was applicable to providing the School-house.

Now, in this Case, I do not see that I can, according to any fair and reasonable interpretation of the words of the Bequest, hold that Mr. *Graves* did point at the Land in question, or any other Land: for the words are, "I give and bequeath to the Butchers' Charitable Institution, the sum of

(q) 9 Ves. 544.

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5,000*l.* towards building Almshouses to (which I consider to mean the same as *for*) the said Institution." I admit that, if he had said, "towards building the Almshouses," the Court might have held [*662] that those Words did point at the Land; but he has used general terms. Therefore, though I have no doubt, in my own mind, what he intended, I am bound to say, as a Judge, that he has not so expressed his intention as to enable me to order the Legacy to be paid. At the same time, it is so fit a Case to be brought under the consideration of the Court, that the Bill ought to be dismissed without Costs (*r*).

WOOD v. PRESTON.

Costs.—Petition.—Affidavits.

Under an Order dismissing a Petition on hearing the Affidavits in support of it, read, the Respondent will be allowed the Costs of all the Affidavits on both sides.

THE following Note was copied, with The *Vice-Chancellor's* permission, from a Note-book belonging to him.

"If a Petition is presented, and Affidavits made in Support and in Opposition, and, on hearing the Petition and several of the Affidavits in support, the Court orders the Petition to be dismissed with Costs, and the Order is drawn up stating the Petition, and on hearing the Affidavits of *A. B. &c.* (the Affidavits that were read), the Court orders the Petition to be dismissed with Costs: Master *Eden* informed me that all the Masters were of opinion that, in taxing the Costs, they would give the Respondent the Costs of all the Petitioner's, as well as of all the Respondent's Affidavits."—January 29, 1829.

"He afterwards told me that the Clerks in Court agreed to this."

*BROWN v. POCOCK.

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1834: 8th December.—*Feme Covert.—Separate Property.*

A Gift for the separate Use of a single Woman without anticipation, will not prevent alienation by her, unless it is made with reference to an intended Marriage.

LADY POCOCK, Widow, by a Codicil to her Will, dated the 6th of July 1817, after reciting that it was her Intention to make some Provision for the

(*r*) Affirmed by the Lord Chancellor, 13th November 1834.

1834.—*Brown v. Pocock.*

three Infant Children, Daughters of the Plaintiff, *James Edward Brown*, gave the Sum of 6,000*l.* to the Defendants, *Isaac Pocock* and *John Innes Pocock*, the Executors named in her Will, upon Trust to lay out and invest the same in Government or Real Securities, and to stand possessed thereof, and of the Interest and Dividends thereof, upon certain Trusts until the said three Children should respectively attain the age of 21 Years, and, thereafter, to pay the whole of the Interest to the said Children, for their respective Lives, in equal Shares. And, in case of the Marriage of any one or more of the said three Children, the Testatrix directed that one equal third Part or Share of and in the said Trust Funds, Monies and Premises, should be in Trust for the sole, separate and peculiar Use of such Daughter or Daughters of the Plaintiff so marrying, during her or their Life or Lives, and the Dividends and Interest thereof to be paid to her accordingly, but not by way of Anticipation, independent of any Husband or Husbands whom she or they might marry, and not to be in any manner subject or liable to the Debts, Engagements, Power or Control of such Husband or Husbands, and that, from and after the Decease of such Daughter or Daughters so marrying, her or their Share or Shares of the said Trust Monies and Premises, should go to their Child and Children, with benefit of Survivor-
 [*664] ship and Accruer, in case of the Death of any one or two of the said three Children without leaving a Child who should attain a vested Interest in its Mother's Share.

The Testatrix made another Codicil, dated the 16th of May 1818, whereby, after reciting that she had, by a Codicil to her Will, made Provision for the three Infant Children, Daughters of the Plaintiff, *James Edward Brown*, of 6,000*l.*, in Trust for the Benefit of the said three Children in manner mentioned in the said Codicil, and that the said *James Edward Brown* had a fourth Child, a Daughter; she declared that, notwithstanding the said Codicil, the 6,000*l.* should be in Trust for all the Children of *J. E. Brown* living at his Decease or born in due time afterwards, in equal Shares, with the like Powers as in the said Codicil mentioned.

The Testatrix died on the 6th of July 1818. The Plaintiffs, *Ann Elizabeth Brown*, *Sarah Elizabeth Brown*, *Charlotte Elizabeth* and *Marianne Elizabeth Brown*, were the Infant Children of *James Edward Brown*, referred to in the Codicils.

Under the Decree, the Executors paid the 6,000*l.* into Court to the Account of the Plaintiffs the Infants, and that Sum was afterwards laid out in the purchase of 8,149*l.* 8*s.* Three per Cents., which, by accumulation, became increased to 8,613*l.* 2*s.* 2*d.* like Stock.

Ann Elizabeth Brown attained 21 on the 9th of April 1832. She afterwards agreed to sell a redeemable Annuity of 40*l.* 10*s.* to *John Hovil*, for

1834.—*Evans v. Hughes.*

her Life ; and, by a Deed of the 22d of June 1832, after reciting the Contract for the Sale of the Annuity, to be secured by "an [*665] Assignment of her Fourth Part of the Dividends of the 8,613*l.* 2*s.* 2*d.* Stock, she assigned, to *Hovil*, her Share and Interest in the Stock, upon Trust, thereout, to pay and keep down the Annuity.

Sarah Elizabeth Brown died unmarried, in July 1832, whereby *Ann Elizabeth Brown* became interested in one Third of the Stock. In October 1832, she married *Samuel Andrews*.

By an Order of the *Lord Chancellor*, made on the 26th of March 1834 (*a*), on the Petition of *Hovil*, it was ordered, that 2,845*l.* 11*s.* 5*d.* Three per Cents., being one Third of 8,536*l.* 14*s.* 4*d.* like Stock, then standing in the name of the Accountant-general, in Trust in the Cause, being the Balance of the 8,613*l.* 2*s.* 2*d.* Stock after payment of certain Costs, should be carried over to an Account, to be intituled, "Mrs. *Andrews's* Account ;" and that, out of the Dividends, the Annuity should be paid to *Hovil* during the Life of Mrs. *Andrews*, or until further Order.

Mrs. *Andrews* having contracted to sell an Annuity of 72*l.* 15*s.*, for her Life, to a person named *Mortimer*, for 800*l.*, out of which it was agreed that *Hovil's* Annuity should be repurchased, and that the payment of the Annuity of 72*l.* 15*s.* should be secured out of the future Dividends of the 2,845*l.* 11*s.* 5*d.* Stock, she and her Husband presented a Petition praying that the Dividends of the 2,845*l.* 11*s.* 5*d.* Stock might be paid to *Mortimer*, during the Life of Mrs. *Andrews*, or until further Order.

*Sir *E. Sugden*, for the Petitioners, said that it had been decided that a Gift for the separate use of a Woman, without Anticipation, will not prevent Alienation by her, unless it is made with reference to a Marriage then in Contemplation (*b*).

Mr. *Spurrier*, appeared for *Hovil*, whose Annuity was to be paid off.

The *Vice-Chancellor* made an Order as prayed.

EVANS v. HUGHES.

1834: 9th December.—*Practice.—Amendment.*

Plaintiff, after Defendant had answered, amended by adding another Defendant. After that Defendant had answered, Plaintiff again moved to amend, not requiring any Answer from the original Defendant. Motion granted.

DEFENDANT, in his Answer, admitted that he was in Possession of certain

(*a*) See *Brown v. Pocock*, 2 Myl. & Keen, 189 ; and 2 Russ. & Mylne, 210.

(*b*) See *Woodmeston v. Walker*, 2 Russ. & Myl. 197 ; *Jones v. Salter*, *ibid.* 208 ; and *Newton v. Reid*, *ante*, Vol. IV. p. 141.

 1834.—Partington v. Baillie.

Deeds which the Bill sought to have delivered up, but said that they belonged to another Person, whom he named. The Plaintiff then amended his Bill, by making that other person a Defendant.

After that Defendant had answered, Mr. *Parker*, for the Plaintiff, again moved to Amend, not requiring any Answer from the original Defendant.

The *Vice-Chancellor*, said that the amended Bill must be considered as an original one, with respect to the new Defendant; and that the Case was within the spirit of the 13th Order.

Motion granted, the Plaintiff undertaking not to serve the original Defendant with a Subpœna to answer the Amendments.

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*PARTINGTON v. BAILLIE.

1834 : 23d December.—*Practice*.—*Dismissal of Bill*.

The Solicitor for some of the Defendants was Agent for the rest. The former were entitled to move to dismiss, and they moved accordingly; but no Order could be made, as the Time for the other Defendants to answer the Amendments has not expired. Motion refused, with Costs, as the Solicitor must have known that the Motion could not succeed.

THE Solicitor for some of the Defendants, was also Town agent to the Solicitor for the others. The first mentioned Defendants were entitled to move to dismiss the Bill for want of Prosecution, and a Notice of Motion to that effect, signed by their Solicitor, had been served upon the Plaintiff. With respect to the other Defendants, the Bill had been amended, and *they* had been served with Subpœnas to answer it; *but their time for answering had not expired*.

Mr. *Koe* now moved to dismiss the Bill as against the first-mentioned Defendants.

Mr. *Parker*, for the Plaintiff, submitted that, though the Parties on whose behalf the Motion was made, were in a situation to move to Dismiss, their Solicitor, when he gave the Notice of Motion, must have known, as Agent for the other Defendants, that the Cause was in such a state with respect to them, that the Plaintiff could successfully oppose the Motion, and therefore, that the Motion ought to be refused with Costs.

THE VICE CHANCELLOR :

As the Solicitor who signed the Notice of Motion, was Agent for the other Defendants, he must have known what was the situation of the Cause with respect to them, and, consequently, that a Motion to Dismiss, made on behalf of the Defendants for whom he was Solicitor, could not succeed. The Court ought not to allow a Person to make use of his Knowledge of the Prac-

1834.—Gully v. Van Bodicoate and Others.

tice of the Court, merely to extort Costs, and, therefore, I shall refuse the Motion with Costs.

*GULLY v. VAN BODICOATE AND OTHERS.

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1834 : 13th December.—Practice.—Dismissal—Construction of 26th Order of 1833.

Threatening Defendants who have not answered, with an Attachment, without issuing one, is not using due diligence, to get in their Answers, so as to prevent another Defendant from moving to dismiss. A Defendant may move to dismiss after the expiration of Two Months from the Time when his Answer was to be deemed sufficient, although, owing to the Answers of the other Defendants not being filed, the time for amending the Bill has not expired.

THE Answer of the Defendant *Gibson* was filed on the 9th, and the Answer of the Defendant *Holden*, on the 10th of May 1834 ; since which time no further Proceedings had been taken as to them.

Mr. *Cooke* now moved to dismiss the Bill, for want of Prosecution, as against those Defendants. He said that two Lunar Months had expired after their Answer to be deemed sufficient, without reckoning the Interval between the last Seal after Trinity and the first Seal before Michaelmas Term.

Mr. *Metcalf*, for the Plaintiff, referred to the 26th Order of 1833, and said that the Answer of a third Defendant had been recently filed ; and that the time allowed, by the 13th Order of 1831, for a Plaintiff to amend, in the Case of several Defendants, was six Weeks after the last Answer should have been deemed sufficient ; that that time had not expired with respect of the Answer which had been last filed ; that the Answers of the other Defendants had not yet been put in, and, therefore, the Motion was premature.

Mr. *Cooke*, in reply, said that the intention of the 26th Order of 1833 was merely to prevent a *sole* Defendant from moving to Dismiss before the time for amending the Bill had expired, and never could be intended to deprive one of several Defendants, who had duly answered the Bill, from moving to Dismiss, for want of Prosecution, "after the expiration of two Months from the time when his Answer was to be deemed sufficient, although, if no Application to Dismiss should be made, a Plaintiff might be entitled to amend within six Weeks after the last Answer in the Cause was to be deemed sufficient ; and that, if the Construction of the 26th Order of 1833 contended for by the Plaintiff, should be adopted, the words "*as to such Defendants*," which occur in it, could have no meaning.

The VICE-CHANCELLOR :

Before the Orders of 1833 were made, I had, in several instances, de-

1834.—The Attorney-General v. The Goldsmiths' Company.

cided, upon the Construction of the 16th Order of 1831, that a Defendant was entitled to move to Dismiss for want of Prosecution, when he could bring his Case within that Order, notwithstanding the time limited, by the 13th Order of 1831, for amending the Bill, had not expired. The 26th Order of 1833, was made merely to prevent a Motion to dismiss being made, where the time for amending had not expired *as against the Defendant moving to Dismiss*: and I think that the Construction of that order, contended for by Mr. *Cooke*, is the true Construction.*

Mr. *Metcalf* then said that the Plaintiff's Solicitor had made an Affidavit, stating that he had frequently called upon the Clerk in Court for the Defendants who had not answered, and had threatened an Attachment, and therefore that due Diligence had been used to get in their Answers, within the Terms of the 16th Order of 1831.

[*670] *Mr. *Cooke* contended that the Plaintiff ought to have issued an Attachment against the Defendants who had not answered: and

The *Vice-Chancellor* was of that opinion.

Mr. *Metcalf* then undertook to Speed.

THE ATTORNEY-GENERAL v. THE GOLDSMITHS' COMPANY.

1834: 12th December.—*Pleading.—Multifariousness.*

An Information after stating a Will by which property was given to the Defendants, for the purpose of making Loans to young Men free of the Company, to assist them in Trade and otherwise, alleged that divers other Donations and Bequests had been made to the Company, for the purpose of making Loans to young Men, for their advancement in Business, or in Life, and prayed that the Principal and all other like Gifts, to the Company, for Loans might be established, &c. Held that the Information was multifarious, though the Company were the only Defendants to it.

THE Information stated that, in 1491, or thereabouts, *Thomas Wood*, a Citizen and Goldsmith of London, did by his Will, or some valid Conveyance or Deed of Gift, demise, give or convey a plot of Ground in *Cheapside*, with the Houses and Shops thereon erected, to the Goldsmiths' Company, together with certain Monies and other Effects, upon Trust to receive the Rents and Profits of the said Land, Houses and Shops, and to lay out and invest the said Monies and other Effects, and receive the Interest, In-

* *Peacock v. Sievier*, reported *ante*, 553, was decided when the Orders of 1831 were in force.

1834.—The Attorney-General v. The Goldsmiths' Company.

come and Profits thereof ; and, from time to time, to lend out, such Monies as should be received by them in respect of the said several Premises, to young Men being Free of the Company, and particularly to such before-mentioned young Men as should be, from time to time, the Tenants or Occupiers of any of the said Shops, as and for Stocks and Capital, for the purpose of assisting such young Men to carry on their Trade in the said Shops and otherwise : that, upon *Wood's* Death, the Company entered into, and had, ever since, continued in possession or receipt of the Rents and Profits of the Houses and Shops, and accepted the [*671] Charitable Trusts reposed in them as aforesaid : that, for many years past, no part of the Rents, Interest, or Profits of the Houses, Shops, Monies and Premises had been lent, by the Company, to young Men free of the same, but had been applied to the general purposes of the Company : *that divers other Bequests and Donations had been made to the Company, for the purpose of making Loans to young Men for their advancement in Business or in Life*, but no part thereof had, for a great number of years, been applied for any such Charitable Purposes as aforesaid : that the aforesaid several Charitable Donations, Legacies or Devises, and, particularly, the Donation or Devise of the said *Thomas Wood*, ought to be established, and the aforesaid several Rents, Interest, Profits, Proceeds, Accumulations and Sums of Money, ought to be lent out in the manner directed and intended by the said *Thomas Wood* and the other Donors beforementioned, or otherwise applied as nearly according to the Directions and Intentions of the several Donors as might be, or for some other Charitable Purposes or Purpose similar thereto. The Information charged that the Company had, from time to time, been possessed of divers large Sums of Money constituting part of their General Corporate Property, and which they had, from time to time, laid out in the Stocks and on other Securities, and also in the purchase of Lands, and that the Rents, Interest, Profits and Proceeds of the said Lands, Houses, Shops, Monies and Premises, and the accumulations thereof, were then blended with their General Corporate Property ; and that the said several Sums ought to be set apart and secured, together with the future Rents and Profits of the said Houses, Shops and Premises, and the Interest and Proceeds of the said other *Monies and [*672] Premises, for the due application thereof for the time to come ; and that a Scheme ought to be framed to secure the due performance of the said Charitable Purposes : that the Company had, in their custody or power, the Will or Deed of Gift of the said *Thomas Wood*, and also other Wills relating to the Charitable Trusts aforesaid, or the Probate, or some other Copies of or Extracts from the said Wills, or Entries or Records relating thereto, and also divers Deeds, Copies of and Extracts from Deeds, Will

 1834.—The Attorney-General v. The Goldsmiths' Company.

Books, minute Books, and other Book, Books of Accounts and other Papers and Writings relating to the said Charitable Donations, Devises or Bequests, and to the several Matters aforesaid, or some of them, and that they ought to set forth a Schedule thereof, and to leave the Originals with their Clerk in Court. It prayed that *Wood's* Charity, and all other (if any) like Gifts and Bequests to the Company for Loans, might be established, and the due performance of the said Charitable Trusts enforced for the future; and that a Scheme might be framed for that purpose; and that Accounts might be taken of all the Messuages or Tenements, Estates, Rents, Interest, Monies and Premises beforementioned, and of the manner in which the same and every part thereof, had been, from time to time, applied, laid out and invested.

The Company demurred to the Information, *because it was exhibited against them, for several and distinct matters*, which ought not to be joined together in one Information.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Lovat*, in support of the Demurrer, said that the Relators had no grounds whatever for the statement [*673] in the Information, "as to the existence of other Bequests and Donations, and that the charge of misapplication was introduced merely to meet one of the Objections that was made to the Information in *The Attorney-general v. The Merchant Tailors' Company* (a); that there the Sums were small, and the objects of all the Charities were the same; but here a Real Estate was to be administered; and the Charities were not confined to young Men, Members of the Company, or indeed of any particular description whatever: that, by *Wood's* Will, a special Trust was raised in favour of the Occupiers of the Houses, and therefore they ought to have been made Parties to the Suit.

[The *Vice-Chancellor*, after reading the Interrogatories, said: There is no Charity that ever existed in the hands of this Company, that might not be brought forward under these Interrogatories.]

Mr. *Cooper*, for the Relators.

The language of the Demurrer is peculiar: it is not in the ordinary form of a Demurrer for Multifariousness. It does not proceed on the ground that the Information unites distinct matters as against different Defendants, but matters which might be made the subjects of several different Informations against the same Defendants. Here there is one set of Defendants only; and matters capable of being separated from each other, may be introduced into the same Bill or Information against the same set of Defendants, or against an only Defendant. Is it not the best course to comprise,

(a) *Ante*, p. 288; and 1 Myl. & Keen, 189.

 1834.—The Attorney-General v. The Goldsmiths' Company.

in one Information, all the Donations and Bequests which have been made to the Company, for the purpose of making Loans?

*The Company, instead of being put to any extraordinary Ex- [*674]
pense by such a course, will be saved Expense by it. The doctrine respecting Multifariousness was first introduced into this Court by our Ecclesiastical Chancellors. The *Prax. Alm. Cur. Canc.* vol. 2, p. 493, contains the following form of a Demurrer for Multifariousness: "These Defendants, by Protestation, &c. and for cause of Demurrer thereunto, these Defendants say that the said Bill containeth, in itself, several and distinct Charges, for several and distinct Matters against several and distinct Defendants, which have not any relation or reference the one with the other, whereby the said Bill is drawn to a great and unnecessary length of above 120 sheets of paper."

The form of a Demurrer for Multifariousness is given in Willis on Pleading, 404. That work received the sanction of Lord *Redesdale*, before publication. *Berke v. Harris* (b). Lord *Redesdale*, in his Treatise on Pleading, says: "The Court will not permit a Plaintiff to demand, by one Bill, several matters of different natures against several Defendants; for this would tend to load each Defendant with an unnecessary burthen of Costs, by swelling the Pleadings with the state of the several Claims of the other Defendants, with which he has no connexion. A Defendant may, therefore, Demur, because the Plaintiff demands several matters, of different natures, of several Defendants, by the same Bill (c)."

In *The Attorney-general v. The Merchant Tailors' Company*, your Honour is reported to have said: "In my opinion this Demurrer ought not to be allowed. *These eight Charities are so directed [*675] to the same objects, that it would be improper to File separate Informations as to them."

The VICE-CHANCELLOR:

I cannot persuade myself that the doctrine respecting Multifariousness, is confined within such narrow limits as Mr. *Cooper* has represented it to be. For I apprehend that, besides what Lord *Redesdale* has laid down upon the subject, there is a Rule arising out of the constant practice of the Court, and that it is not competent, where *A.* is sole Plaintiff, and *B.* is sole Defendant, for *A.* to unite, in his Bill against *B.*, all sorts of matters wherein they may be mutually concerned. If such a mode of proceeding were allowed, we should have *A.* filing a Bill against *B.*, praying to foreclose one Mortgage, and, in the same Bill, praying to redeem another, and asking many other kinds of Relief with respect to many other subjects of complaint.

(b) Hardres 337.

(c) Treat. Plead. 3d Edit. 147.

1835.—Barwick v. Ward.

This Court so far follows the practice of Courts of Law, as that its Judgment is given on one Case; and though, at Law, where the Action is an Action of Debt, you may declare both upon a Specialty and on a Simple Contract, yet you cannot join, in one Action, Covenant, Case, Trover, Detinue, &c. So this Court requires that one subject should be presented to it for its Decision, and it will not allow itself to be called upon to pronounce different Decrees, on several totally distinct matters. Therefore, such a course as the present, ought not to be permitted. For what does this Information do? It states, first, that there is a Charity for the benefit of young Men being Free of the Company, and then it states that divers [*676] other Bequests have been made, to the Company, *for the purpose of making Loans, to young Men, for their advancement in Business or in Life. Now there may be a thousand such Charities for making Loans to young Men of different descriptions; but how could the Court, by one Decree and one Scheme, embrace such multifarious matters? If it had been so alleged in the Information as to show that the character of all these other Bequests, was homogeneous, though there might be minute differences between them, they might all have been comprised in the same Information. But, here, there is a total want of any such Allegation, and, therefore, I must suppose that the other Bequests and Donations are totally distinct from, and in no way homogeneous with the principal object of the Suit. This Demurrer is grounded upon the acknowledged practice of the Court, and, therefore, it must be allowed.

BARWICK v. WARD.

1835: 19th January.—Practice.—*Pro confesso*.

A Cause may be advanced for the purpose of taking the Bill *pro confesso*.

THIS was a Foreclosure Suit. The Cause had been advanced in order that the Bill might be taken *pro confesso* (a).

Mr. Parker, on applying that the Bill might be taken *pro confesso*, stated that the Master of the Rolls (Sir C. C. Pepys) had ruled that the Court had no power to advance a Cause in order that the Bill might be taken *pro confesso*.

The Vice-Chancellor said that in a Case, of which he had a [*677] Note, Lord Eldon had decided, after Argument, *that a Cause might be advanced for the purpose of taking the Bill *pro confesso*. And, accordingly, the Bill in this Cause, was taken *pro confesso*.

(a) See *Baker v. Keen*, ante, Vol. IV. p. 498.

1835.—Jones v. Jones.

The following is a Copy of the Note above alluded to :

Bolton v. Glasford.

A SERJEANT AT-ARMS was granted. He returned, *non est inventus*. The Return was indorsed on the Writ, but never filed. Then a Sequestration issued, and, on that being returned, the Bill was set down to be taken *pro confesso*. Afterwards, an Order was obtained to advance the Cause, so that it might be at the head of the Paper on a particular day; and then a Decree was made on the Bill so taken *pro confesso*.

In Michaelmas Term 1810, a Motion was made to set aside the Decree, for Irregularity, on two grounds : first, because the Return of the Serjeant-at-Arms was not filed : and, secondly, because the Cause had been advanced.

But the Motion was refused after long Argument.

Sir *S. Romilly*, Mr. *Richards* and Mr. *Shadwell*, for the Plaintiff. Mr. *Leach*, Mr. *Bell* and Mr. *Dowdeswell*, for the Defendant.

Lord *Eldon* gave Judgment on the first Point, on the 12th of November 1810, and, on the second, on the 8th of March 1811.

•JONES v. JONES.

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1835 : 11th March.—*Creditor.—Costs.*

Where a Motion is made after Decree, in a Creditor's Suit, to restrain a Creditor from suing at Law, the Creditor is entitled to the Costs of the Motion.

THIS was a Creditor's Suit.

On a Motion made, on behalf of the Executor of the deceased Debtor, for an Injunction to restrain a Creditor from suing at Law, after Decree, the question was whether the Creditor was entitled to the Costs of the Motion.

Mr. *Koe*, for the Executor, contended that the Creditor was not entitled to the Costs; and cited *Anon.* (a).

The *Vice-Chancellor*, after consulting the Registrar, said that the Practice had been otherwise, and gave the Creditor the Costs of the Motion.

(a) 2 Sim. & Sta. 424.

1835.—Memorandum.

MEMORANDUM.

The decision in *Grigby v. Powell*, reported *ante*, p. 290, was affirmed, by the House of Lords, on the 17th March 1835 ; and the decision in *Waterton v. Croft*, reported *ante*, p. 502, was affirmed by the Lord Chancellor (Lord Lyndhurst) on the 26th of the same month.

ERRATUM.

P. 571, in the Title and throughout the Case, for *Yordon* read *Jorden*, and add a reference to 1 Mylne & Keen, 416.

AN

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1. To a bill claiming title to an estate, the defendant pleaded that the title of the

party through whom the plaintiff claimed, accrued in 1759, and that the possession of the estate had been, ever since, adverse to the plaintiff and to the persons through whom he claimed. Plea overruled, because it did not state particularly the facts on which the defendant meant to rely as constituting the adverse possession, and, therefore, the plaintiff could not know what case he had to meet. *Hardman v. Ellames.* 640

2. A plea of adverse possession, to a bill charging that the defendant has, in his custody, documents showing the plaintiff's title, must be accompanied with an answer denying that charge. *Ibid.*

AFFIDAVIT.

If several affidavits are made in support of and in opposition to a petition, and, on hearing the petition and several of the affidavits in support of it, the petition is dismissed with costs, the respondent will be allowed the costs of all the affidavits on both sides. *Wood v. Preston.* 662
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AGREEMENT.

The plaintiff and his wife, who was one of the children of A., agreed with the other children, to divide equally A.'s property at his death. The plaintiff's wife died before A., and the plaintiff was her ad-

ministrator. He made an assignment, by which his share passed, and afterwards filed a bill for a specific performance. Held that the agreement was valid; and that the plaintiff being a trustee of his share for the assignees, the suit was properly instituted by him. *Hyde v. White*. 524

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Defendant pleaded to the bill, upon which the plaintiff amended. The defendant then filed a general demurrer to the amended bill. Held that the demurrer was regular. *Robertson v. Lord Londonderry*. 226

AMENDMENT.

1. Defendant filed a cross bill for a discovery. The plaintiff in the original suit took an office-copy of, but did not answer the cross bill. After the hearing of the original cause, defendant amended his cross bill by praying relief. Held that, under the circumstances, he was at liberty so to do. *Severn v. Fletcher*. 457
 2. Plaintiff, after defendant had answered, amended by adding another defendant. After that defendant had answered, plaintiff again moved to amend, not requiring any answer from the original defendant. Motion granted. *Evans v. Hughes*. 666
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ANNUITY.

When an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the Court will not restrain the executors of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out. *Read v. Blunt*. 567

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ANSWER.

1. Plaintiff amended his bill. Before the amendments were answered the suit abated. Plaintiff then filed a bill of revivor and supplement, praying that the defendants might answer that bill together with the amendments. The de-

fendants put in an answer to the bill of revivor and supplement only. Motion to take the answer off the file for irregularity, refused. *Sayle v. Graham*. 8

2. If a plaintiff reads a passage from the answer, as evidence, he is compellable to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects. *Nurse v. Bunn*. 225

3. An information alleged certain sums to be vested in the defendants, for certain charitable purposes, and that the defendants had misapplied those sums: it also alleged, generally, that other sums were vested in the defendants upon like trusts, but did not charge any misapplication or breach of trust with respect to them. Held that the defendants were not compellable to answer the general allegation. *Attorney-general v. Merchant Tailors' Company*. 328

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1. Where a testator having a general power of appointment over a fund, exercises it by will, probate duty must be paid in respect of the fund. *Palmer v. Whitmore*. 178
2. A lady having four children by her first husband, and three by her second, and having power to appoint a fund amongst the former only, appointed it amongst all her children equally, and declared that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. Held that the appointment was not wholly void, but that the first class of children took, each, one seventh of the fund, under it, and the other shares went to them, as in default of appointment. *Sadler v. Pratt*. 632

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APPORTIONMENT.

A., on his marriage, grants a rent-charge, to his wife, out of his estates, for her jointure; which he secures by a term limited to trustees. By his will, he gives his mansion-house and park, to his wife, for life, and the rest of his estates, to B., and directs that the repairs, painting, &c. of his mansion-house shall be paid for, by sale of timber on the premises devised to B., and then he confirms the settle-

ment. Held that the jointure is wholly raiseable out of those premises. *Grigby v. Powell.* 200

ARBITRATION.

Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission may be made a rule of a court of law, on the application of either party, but which has not been done: Held, on demurrer, that this Court has jurisdiction to relieve against the award. And the Court having once exercised its jurisdiction over the award, will retain it, although on the coming in of the answer, it appears that the submission had then been made a rule of a court of law, by the defendant. *Nichols v. Roe.* 156

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BANKRUPT.

1. A trader, on his marriage, received a fortune of 5,000*l.* with his wife; and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided that, if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, 15 sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l.* was settled; but the whole of the settled fund was the husband's property, and it did not appear, from any of the expressions in the settlement, what was the consideration for the provision as to 15 sixty-sixths of the stock. Held that the limitations over in the event of the bankruptcy of the husband, were good as to 15 sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester v. Garland.* 205
2. In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants taken before the commissioners on the first day, but declined to read the examination

taken on the second day. Ruled that the whole must be read. *Smith v. Biggs.* 391

3. The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Ibid.* 391
4. The evidence of a bankrupt which, in one respect, is in his own favor, but, in another respect, against himself, is receivable. *Ibid.* 391

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CAUSE AND CROSS CAUSE

1. In a case of cause and cross cause, where the plaintiff in the former, is abroad or cannot be found, the proper course is to stay the proceedings in that suit, until the plaintiff has answered the cross bill, and not to order service of the subpoena, to answer the cross bill on his clerk in court in the original cause. *Watterton v. Croft.* 502
2. Proceedings in the original cause stayed until the plaintiff had appeared to and answered the cross bill. *Bourne v. Hall.* 552

CHARITY.

1. The defendants, and other companies, were formerly obliged to keep a stock of corn, for the supply of the market, and to sell it when the lord mayor directed, and he, on some occasions, fixed the price. In 1646, an estate, then let for 70*l.*, was conveyed in trust to pay, out of the rents, certain annual sums amounting to 70*l.* One of the sums was to be paid, to the company, for the increase of their stock of corn, for the service of the market, and the residue of the rents were given to them for the same purpose. Other sums were given for clearly charitable purposes. The rents were now more than sufficient to pay the sums specified. Held that the gift to the company, was

not a charity, and that, the purpose of it having failed, they were entitled to apply it, and also the surplus rents after making the specified payments, to their corporate purposes. *Attorney-general v. Haberdashers' Company.* 478

2. Testator devised an estate to the Fishmongers' Company, to buy and distribute 138 quarters of coals, or money to buy coals at 8*d.* per quarter, amongst the poor, and added that the sum total in money for the 138 quarters, at the price aforesaid, amounted to 4*l.* 12*s.*, and that, if the coals could be bought for less, more should be given. The testator then gave 40*s.* out of the residue of the rents, to the company, for executing his will, and directed that whatsoever remained, should be disposed of in repairing the buildings on the estate, and to the use of the company; but, if they declined to perform his will, then that the estate should go to the corporation of London for different charitable purposes. Held that the company were not bound to distribute, either in coals or in money, more than to the amount of 4*l.* 12*s.* yearly, and that they were entitled to the surplus of the rents. *In re Jordan's Charity.* 571

3. By the Bedford Charity Act, the trustees of the charity, who are a body corporate, are empowered to remove the master of the English school, for just and reasonable cause; and it is provided that if any trustee or trustees should misbehave himself or themselves, in any manner relating to the charity, it should be lawful for any person to prefer a petition to the Lord Chancellor against any such trustee or trustees, and with or without making all or any of the other trustees parties thereto, if such person should so think fit; and the Lord Chancellor is authorized to cause the person or persons against whom the petition should be preferred, to be examined, in such manner as should be thought fit, for the discovery of the truth of the matter alleged against him. One of the masters who had been dismissed by the trustees, presented a petition against them, complaining that he had been dismissed irregularly, and not for good and reasonable cause. Held that the Court had no jurisdiction to entertain the petition. *In re Bedford Charity.* 578

4. A. after reciting that he was instigated by piety, for the sustentation of Tonbridge School, and of a student in Oxford, granted lands to the Skinners' Company, as governors of the possessions of the school (by which title they had been then lately incorporated) to fulfil the uses expressed in a schedule to the grant, and which directed them to make certain payments to the student, to the college at

which he was to be placed for assisting the company, as such governors, in providing a master for the school, to a preacher for preaching, yearly, before the company, and exhorting them to be beneficial maintainers of the school, and to certain poor men of the company. The payments did not exhaust the rents at the time of the grant, and the company, in A.'s lifetime, and with his knowledge, applied the surplus to their own use, and had ever since continued to do so. An information claiming the surplus for the school, was dismissed. *Attorney-general v. Skinners' Company.* 596

5. Testator bequeathed 5,000*l.* to a charitable institution towards building almshouses. Testator, who was a member of the institution, knew that it was intended to build the almshouses, and that a piece of land had been offered to and accepted by the institution, for that purpose, but no conveyance of the land had been executed, though the trustees were in possession, at the testator's death, and, afterwards, the land was duly conveyed to the trustees. Held that the bequest was void. *Giblett v. Hobson.* 651

See INFORMATION.—PLEA AND PLEADING, 9.

CHARITY PETITION ACT.

Under the Charity Petition Act, where one order has been made on petition, a subsequent order may be obtained on motion. *In re Chipping Sodbury School.* 410

CODICIL.

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COMMISSION TO EXAMINE WITNESSES ABROAD.

It is not necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, should state either the names of the witnesses, or the matters to which they are to be examined, in a case where it is evident that such examination is necessary. *Carbonell v. Bessell.* 636

See NEW ORDERS, 2.

COMPENSATION.

A. agreed to sell an estate, tithe-free, to B. Afterwards, C., the vicar of L. (in which parish part of the estate was situate) filed a bill for tithes against the occupiers of another part of the estate, as also being situate in L. A. agreed that part of the purchase-money should be set apart, as an indemnity to B. against the claim made by C.; which was accordingly done, and B. paid the remainder of his purchase-money, and took a conveyance

of the estate. C. died, and his suit was dismissed for want of prosecution, but the indemnity fund was not transferred to A. One of C.'s successors instituted a fresh suit for the tithes of the same lands. Pending these proceedings it was discovered that those lands were situate in the parish of S. and were titheable to the rector of S., and on proof of those facts, the latter suit was dismissed at the hearing. Held that B. was entitled to a compensation out of the fund, for the tithes of the land situate in S. *Crompton v. Lord Melbourne*. 353

See INCLOSURE ACT.

CONDUCT OF SUIT.

Notwithstanding the Master may have refused an application under the 56th order, to take the prosecution of a decree from the plaintiff, and commit it to another party, the Court is at liberty to grant the application, the Master's judgment not being final. *Wyatt v. Sadler*. 450

CONSENT TO INSTITUTION OF SUIT.

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CONSTRUCTION.

1. Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the said dividends to his brother A. to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, and upon the demise of the annuitants or any of them, the testator gave, each annuitant's proportion of the before-mentioned dividends, to his brother A., to be at his disposal, but the principal to remain in the Bank. Held that no trust was created for the children of F., but that A. took, absolutely, the capital of the testator's stock, subject to the annuities. *Benson v. Whittam*. 22
2. Testator devised all his real estates to trustees, in trust to convey his lands in W. to A., when and so soon as he should attain 21: but in case he should die under that age and without leaving issue, then over; and when B. should attain 24, in trust to convey the rest of the real estates to him, on his giving security for the annuities given by the testator, and executing certain deeds, to the satisfaction of the trustees: but in case B. should die before he attained 24, without leaving issue, then over. A. and B. were both infants at the testator's death. Held that A. took a vested interest in possession, in the lands in W., but that B.'s interest in the rest of the estates was

contingent on his attaining 24, and doing the acts required. *Phipps v. Williams*. 44

3. Testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her grand-daughter, if she should survive her mother and attain 21; but in case she should not survive her mother and attain 21, then in trust for such other child or children of the testatrix's said daughter as should be living at their mother's death, to be paid to them after her death as they attained 21, and if all such other children of the testatrix's said daughter should die before attaining 21, then in trust for L. M. The grand-daughter attained 21, but did not survive her mother. Another child of the testatrix's daughter attained 21, but did not survive his mother, afterwards the daughter died. Held that the bequest over to L. M. took effect. *Mackinnon v. Sewell*. 78

4. Testator gave his real and personal estates to his wife for life, remainder to his great nephew F. W., son of his late nephew, and expressed it to be his particular wish and request that his wife, together with F. W.'s grandfather, should superintend and take care of his education, so as to fit him for any respectable profession or employment. Held that F. W. was entitled to be maintained and educated during his minority, in the manner described, out of the income of the testator's estates. *Foley v. Parry*. 138

5. Testator bequeathed his residuary estate to trustees, in trust for his wife for life, and, after her decease, "to preserve the then remaining part of my estate for the grand-children of my brother C., to be by them received in equal proportions when they shall severally attain the age of 25 years, and when the youngest shall have attained the age of 25 years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and brother surviving. Eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards. Held that the bequest was not void for remoteness: but those only of the grandchildren who were in existence at the widow's decease, were entitled to share in the testator's residuary estate. *Kevern v. Williams*. 171

6. Testator gave all his property to trustees, in trust to invest it in securities at interest for the use of his nephew, to be paid at such time and in such manner as the trustees should think fit; and when the nephew should attain 21, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands, as they might think most for his advantage, in weekly or

quarterly payments, for his life. Held that the nephew took an absolute interest in the property. *Billing v. Billing*. 232

7. Testator gave one third of his residue to his niece, which he desired might be settled by his executors on her, for her separate use, for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew. The Court directed the third to be settled in trust for the niece, for her separate use, for life, and, after her death, in trust for her issue then living, and if there should be no such issue, then in trust for the nephew. *Sonor v. Curwen*. 264

8. Testator having a foreclosed mortgage in fee of certain farms in Lancashire, gave, amongst other things, to his wife for life, "the interest or proceeds of certain farms in the county of Lancaster, mortgaged to me for 2,500*l.*;" and after her decease, "one third part of the sum of 2,500*l.* principal money, disposed of in mortgage of the farms aforesaid" to his daughter Harriet; and he declared that, after his wife's decease, his daughter Elizabeth should inherit and enjoy the bequests aforesaid, in the same proportion as his sister Harriet; and that his son should in like manner inherit and enjoy one third part of the aforesaid bequests upon the same conditions as his daughters. Held that the farms passed as real estate to the testator's wife for life, with remainder to his son and daughters as tenants in common in fee. *Le Gros v. Cockerell*. 384

9. Testator bequeathed certain monies, &c. to his wife, in trust for her so long as she remained a widow; and, on her marrying again, he bequeathed to her one third of all his property not otherwise disposed of, and the remaining two thirds to his nieces. The widow died unmarried. Held that she was entitled to the money in the stocks, for her widowhood only, and that, on her dying unmarried, the residue became undisposed of. *Pile v. Salter*. 411

10. Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, and to raise and pay, to each of his children, 2,000*l.* on their attaining 21, and to accumulate the surplus income of the trust property during the life of his wife, and, after her death, to sell the property, and divide the proceeds amongst his children on their attaining 21; and, in case all his children should die in the lifetime of his wife or under 21, and without leaving issue, then, after his wife's death, to sell the trust property, and divide the proceeds amongst certain other persons. Held that *or ought to be read as and*, and that the

children having attained 21, were absolutely entitled to the property though their mother was living. *Miles v. Dyer*. 435

1. Testator gave 200*l.* to each of his nieces and their children, to be paid within nine months after the death of testator's wife, amongst his nieces and their children, as the wife should, by will, appoint. The wife died, without having made any appointment. The executors, within nine months after her death, paid the legacies to the nieces. They afterwards died without having had any children. Held that the payment was properly made. *Pyne v. Franklyn*. 458

See CHARITY.—CROSS LIMITATIONS.—DEVISE.—ELECTION.—ESTATE.—INCLOSURE ACT.—LEGACY.—PORTIONS, 3.—RENT-CHARGE.—WILL.

CONSTRUCTION OF 26TH ORDER OF 1833.

See DISMISSAL OF BILL, 4, 5.

CONTEMPT.

1. An affidavit in support of a motion for a serjeant at arms, under 11 Geo. 4, and 1 Will. 4, c. 36, Rule 1, which relates to the defendant's residence, and not to the place where he was at the issuing of the attachment, is insufficient. *Davis v. Hammond*. 9
2. A defendant who was in contempt for not answering the bill, on being brought to the bar of the Court, under 11 Geo. 4, and 1 Will. 4, c. 36, Rule 6, deposed that he was unable, by reason of poverty, to employ a solicitor to put in her answer: upon which the usual reference was made to the Master.

The defendant refused to make any statement to the Master as to the subject of the reference. Upon which the Court ordered proceedings to be taken, under the 2d Rule of the Act, for taking the bill *pro confesso* against her. *Williams v. Parkinson*. 74

3. A reference having been made, under 11 Geo. 4, and Will. 4, c. 36, Rule 6, neither the defendant, nor any person on her behalf, appeared before the Master, though she had been personally summoned. The Master proceeded *ex parte*, with the inquiry, and reported that the defendant did not appear to be unable, by reason of her poverty, to employ a solicitor to put in her answer. The Court refused to order the bill to be taken *pro confesso*; but referred it back to the Master to review his report, and ordered the Warden of the Fleet to produce the defendant before the Master, at such time and place as the Master should appoint, and that the inquiry should be proceeded

with in the defendant's presence. *Atkinson v. Flint.* 77

4. An order for the discharge of a prisoner from his contempt, under 2 & 3 Will. 4, c. 58, may be made upon motion supported by the certificate of the deputy warden of the Fleet. *Hodder v. Haines.* 441

See DEFENDANT, 6.

CONTINGENT INTEREST.

See CONSTRUCTION, 2.

CONVERSION.

- A. after reciting that he was desirous that his real estates should be sold, conveyed them to trustees, in trust to sell or mortgage the same, and to stand possessed of the money to be raised, in trust for him, his executors, &c. By deed of even date, he assigned all his personal property, to the same trustees, in trust for himself, his executors, &c. By a third deed, of even date, after reciting that he was indebted to various persons, and was desirous that his affairs should be wound up, and his real and personal property converted into money, and his debts paid, and that the conveyance and assignments were made to enable his trustees, in the first place, to pay his debts; it was declared that the trustees should stand possessed of the money to arise from the sale or mortgage of his real and personal property, in trust to pay his debts, and then in trust for him, his executors, &c. The trustees sold part of the real estates, and the proceeds were more than sufficient to pay A.'s debts. Shortly afterwards A. died intestate. Held that the unsold estates were to be considered as personalty. *Biggs v. Andrews* 424

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COSTS.

1. The bill had been dismissed at the hearing, with costs, which the plaintiff refusing to pay, he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody upon bail, but retaken him before the writ was returnable. The Court refused to order the sheriff to pay the costs. *Collard v. Hare* 10
2. A. delivered goods to B. a wharfinger. to be kept for him, and, afterwards, directed B. to transfer them to C., which was done. D. then gave notice to B. not to deliver the goods to any one but

him, and, thereupon, B. refused to deliver the goods to C. Upon which C. brought trover against B. and B. filed a bill of interpleader. Afterwards D. abandoned all claim to the goods and withdrew his notice. Held that the case was a proper case of interpleader, and that D., who had occasioned the suit, must pay to the plaintiff, and the other defendants, their costs at law and in equity. *Mason v. Hamilton* 19

3. A bill had been dismissed for want of prosecution. Before the costs were paid, the defendant died, and the plaintiff filed another bill, for the same object, against the defendant's executor. The proceedings in the latter suit were stayed, until the costs of the former were paid. *Spires v. Scwell* 193

4. A demurrer, by a witness, to two interrogatories, was allowed as to one, and overruled as to the other. The Court gave the witness half the costs of the demurrer. *Davis v. Reid* 443

5. In a suit to establish a will, one of the witnesses could not depose positively to the due attestation of it, and an issue was directed at the heir's request. The verdict was against the heir; but the Court gave him his costs both at law and in equity. *Wright v. Wright* 449

6. A receiver having, without the sanction of the Court, defended actions arising out of a distress for rent, made by him on a tenant of the estate, the Court refused to allow him the costs of the actions. *Seaby v. Dickon* 629

7. Where a motion is made after decree in a creditor's suit to restrain a creditor from suing at law, the creditor is entitled to the costs of the motion. *Jones v. Jones* 678

8. If affidavits are made in support of and in opposition to a petition, and, on hearing the petition and several of the affidavits in support of it, the Court dismisses it with costs, the respondent will be allowed the costs of all the affidavits on both sides. *Wood v. Preston* 662

See DISMISSAL OF BILL, 3.

COSTS OF TAXATION.

The plaintiff had obtained an order for taxation of his solicitor's bill, amounting to 399l. The solicitor, with the Master's permission, struck out certain items, as having been inserted by mistake. The bills were then taxed, and less than a sixth was taken off, but, if the items struck out were included, then more than a sixth would have been taken off. Held that, as less than a sixth had been taken off, the plaintiff must pay the costs of taxation. *Marshall v. Oxford* 456

COVENANT.

A. having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees, for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part. Held that his general personal estate was liable to the performance of the covenant.

Marshall v. Holloway 198

See EXECUTORS AND ADMINISTRATORS, I.—LANDLORD AND TENANT.

COVENANT TO RENEW.

See LANDLORD AND TENANT.

CREDITOR'S SUIT.

1. To a creditor's bill the defendants pleaded a decree obtained by other creditors in a prior suit. Plea over-ruled, the decree being less beneficial to the plaintiffs than they might obtain in their own suit.

Pickford v. Hunter 122

2. Where a motion is made, after decree in a creditor's suit, to restrain a creditor from suing at law, the creditor is entitled to the costs of the motion. *Jones v. Jones* 678

See DEBTOR AND CREDITOR, 5.—PARTIES, 1.

CROSS BILL.

Defendant filed a cross bill for a discovery.

The plaintiff in the original suit took an office-copy of, but did not answer the cross bill. After the hearing of the original cause, defendant amended his cross bill by praying relief. Held that, under the circumstances, he was at liberty so to do. *Severn v. Fletcher* 457

See CAUSE AND CROSS CAUSE.

CROSS EXAMINATION.

See PRACTICE, 12.

CROSS LIMITATIONS.

Testator gave an annuity, to which he was entitled for the life of E., to his daughter L. for life, and, after her death, to her children, but if she should not have any who should survive E., then to such persons as should then be entitled to the testator's personal estate. He then disposed of all his estate amongst his sons and daughters, giving the shares of his sons to them, absolutely, and the shares of his daughters, to trustees, for them, for their respective lives, and, after their deaths, respectively, to apply the interest of the shares of his daughters respectively, for the maintenance of their respective chil-

dren until they attained 21, and then to divide the principal amongst such children respectively, as should attain that age. But, if all such children of his daughters respectively, or both of them, should die under 21, then upon trust to pay the said trust-money, to such persons as should then be entitled to his personal estate. A., one of the testator's daughters, died, leaving children who attained 21. then L., the only other daughter, died without issue. Held that cross limitations were not to be implied, between the children of the daughters, and that the persons who were to take under the gift over, were not sufficiently described, and, therefore, that the annuity and L.'s share of the residue, must go in case of an intestacy. *Turner v. Frederick* 466

CUMULATIVE LEGACIES.

See WILL, 12.

DEBT.

See ACCOUNT.—ANNUITY.—ESTATE.

DEBTOR AND CREDITOR.

1. A trader, on his marriage, received a fortune of 5,000*l.* with his wife; and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided that, if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, 15 sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l.* was settled; but the whole of the settled fund was the husband's property, and it did not appear, from any of the expressions in the settlement, what was the consideration for the provision as to 15 sixty-sixths of the stock. Held that the limitations over in the event of the bankruptcy of the husband, were good as to 15 sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester v. Garland* 205

2. If an executor or administrator pays into Court, under an order in a cause, money which he had received from the deceased's estate, his right to retain a debt due to him from the deceased, is not prejudiced. *Langton v. Higgs* 228

3. A woman entitled to a sum of stock, settled it, on her marriage, for her separate use for life, with power to her to appoint it by will only; but no trust was declared in default of appointment. After her marriage, she signed a promissory note; and then, by will, appointed the stock to her

husband. *Seem* that the holder of the note is not defeated thereby. *Nail v. Punter* 502

4. After a decree in a creditor's suit, the Court will restrain a creditor of the testator from proceeding at law against the assets, but not from proceeding against the executors personally. *Kent v. Pickering* 569
5. Where a motion is made in a creditor's suit, to restrain a creditor from suing at law, the creditor is entitled to the costs of the motion. *Jones v. Jones* 678
See ANNUITY.

DECREE.

See CREDITORS' SUIT—MASTER.—MORTGAGE, 2.

DEED.

See REVOCATION.

DEFENDANT.

1. A defendant, who was in contempt for not answering the bill, on being brought to the bar of the Court, under 11 Geo. 4. and 1 Will. 4. c. 36, Rule 6, deposed that she was unable, by reason of poverty, to employ a solicitor to put in her answer, upon which the usual reference was made to the Master. The defendant refused to make any statement to the Master, as to the subject of the reference. Upon which the Court ordered proceedings to be taken under the 2d Rule of the Act, for taking the bill *pro confesso*, against her. *Williams v. Parkinson* 74
2. A reference having been made, under 11 Geo. 4. and 1 W. 4. c. 36, Rule 6, neither the defendant, nor any person on her behalf, appeared before the Master, though she had been personally summoned. The Master proceeded, *ex parte*, with the inquiry, and reported that the defendant did not appear to be unable, by reason of her poverty, to employ a solicitor to put in her answer. The Court refused to order the bill to be taken *pro confesso* but referred it back to the Master to review his report, and ordered the warden of the Fleet to produce the defendant before the Master, at such time and place as the Master should appoint, and that the inquiry should be proceeded with in the defendant's presence. *Atkinson v. Flint* 77
3. An information alleged certain specific sums to be vested in the defendants, for certain charitable purposes, and that the defendants had misapplied those sums, it also alleged, generally, that other sums were vested in the defendants upon like trusts, but did not charge any misapplication or breach of trust with respect to them: Held that the defendants were not compellable to answer the general allegation.

The Attorney-general v. The Merchant Tailors' Company 328

4. In order to dispense with a person being made a defendant, it is not sufficient to allege that he absconded a year before the bill was filed. *Penfold v. Nunn* 405
5. Leave given to file a supplemental answer to correct a mistake in the original answer. *White v. Sayer* 566
6. The Master allowed exceptions to an answer for insufficiency, and fixed a time for putting in a further answer. After that time expired, the defendant moved for further time. Motion refused; the defendant being in contempt under the 6th of Lord Lyndhurst's orders. *Wheat v. Graham* 570

See ANSWER, 1. 3.—CROSS BILL.—EVIDENCE, 1.—MORTGAGE.—REVIVOR.—PRACTICE, 14. 21. 25. 33. 35.

DEMURRER.

1. Defendant pleaded to the bill, upon which the plaintiff amended. The defendant then filed a general demurrer to the amended bill: Held that the demurrer was regular. *Robertson v. Lord Londonderry* 226
2. Defendant, on the expiration of his time for answering, lodged a petition at the Rolls for further time, and gave notice of his having so done to the plaintiff's clerk in court. Afterwards, without revoking the notice, he filed a demurrer; ordered that the demurrer should be taken off the file. *Murray v. Cauty* 230.
3. A demurrer admits the allegations in the bill, as against the demurring party only. *Penfold v. Nunn* 405
4. A demurrer by a witness to answering interrogatories, on the ground that he might subject himself to penalties, allowed. Such a demurrer may be allowed partially. *Davis v. Reid* 443
5. A demurrer by a witness to two interrogatories, was allowed as to one and overruled as to the other. The Court gave the witness half the costs of the demurrer. *Ibid*

See PLEA AND PLEADING, 5.—MULTIFARIOUSNESS, 1. 2.

DEPOSIT.

Vendor filed a bill for specific performance, but, not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Lord Anson v. Hodges* 227

DEPOSITIONS.

See EVIDENCE.

DEVISE.

Devise of all testator's freehold estates, and

all his farming stock, ready money, bills, bonds, notes and other securities for money, and all the residue of his personal estate, to trustees, their heirs, executors, &c., in trust to sell his real estates, and to sell, get in and convert into money all his personal estate, will pass a mortgage in fee. *Ex parte Barber, in re Tyas* 451

DISCOVERY.

See CROSS BILL.—PRACTICE, 14, 25.

DISMISSAL OF BILL.

1. In computing the time within which a bill may be dismissed on the ground of no proceedings having been taken since the answer was filed, the intervals mentioned in the 19th amended order are not to be reckoned. *The Attorney-general v. Jones* 246
2. Under the orders of 1831, an order to amend, obtained after notice of motion to dismiss, but served before the motion is made, is an answer to the motion; but the plaintiff must pay the costs of the motion. *Peacock v. Sivier* 553
3. The solicitor for some of the defendants was agent for the rest. The former were entitled to move to dismiss, and they moved accordingly, but no order could be made as the time for the other defendants to answer the amendments, had not expired. Motion refused with costs, as the solicitor must have known that the motion could not succeed. *Partington v. Baillie* 667
4. Threatening defendants, who have not answered, with an attachment, without issuing one, is not using due diligence to get in their answers, so as to prevent another defendant from moving to dismiss. *Gully v. Van Bodicote*
5. A defendant may move to dismiss after the expiration of two months from the time when his answer was to be deemed sufficient, although, owing to the answers of the other defendants not being filed, the time for amending the bill has expired. *Ibid.*

See COSTS, 3.—PRACTICE, 21, 30.

ELECTION.

- A. having power under her father's will to appoint a fund amongst her children, or more remote issue, to be born before such appointment, by her will, appoints the fund, and bequeaths her personal estate, to her four children. By a codicil, she, in case she had power so to do, under her father's will, or otherwise, directed that the share which one of her daughters would derive under her will, should be in trust for that daughter for life, and, after her death, for her children generally, and

not those only who were then born, as prescribed by the power. Held that A. did not intend the codicil to affect her own property, but only that which was subject to the power; and that she did not mean to make the appointment unless she had power so to do, which she had not, and, therefore, no case of election arose. *Church v. Kemble* 525

See LEGACY, 3.

EQUITABLE RECOVERY.

See REVOCATION, 2.

EQUITY OF REDEMPTION.

See MORTGAGOR AND MORTGAGEE, 2.

ESCAPE.

See MARSHAL OF KING'S BENCH.

ESTATE.

Testator devised all his goods, chattels, estate and effects, of what nature soever, and wheresoever, not thereby otherwise disposed of, to his executors, upon the trusts after mentioned. He then willed that all his debts, &c. should be paid, and that what remained of his personal effects should be appropriated for the benefit of his family, as his executors should think proper; next he willed that his family should be placed in his farm, subject to the direction and control of his executors, and that, when his youngest son attained 21, it should be sold, and the produce divided amongst his wife and children. Held that the legal fee in the farm passed to the executors, and that they were entitled to sell it for payment of the testator's debts. *King v. Shriver* 461

EVIDENCE.

1. The plaintiff had examined a witness respecting a conversation between the defendant and the witness. the plaintiff declined to read the deposition, at the hearing of the cause, as it made against him. The defendant then proposed to read the deposition, as his evidence. But the Vice-chancellor ruled that the defendant was not at liberty to read the deposition, as it was not evidence for the defendant as to whose conversation it related. *Wilson v. Calvert* 194
2. In a suit for tithes between a vicar and the occupier of a mill, an old map of the parish belonging to the lord of the manor, was not admitted as evidence for the defendant. *Newcome v. Mathew* 243
3. In a suit for tithes by an ecclesiastical rector against the occupiers, a terrier, signed by the vicar, churchwardens and inhabitants, and which was tendered by the defendants, was rejected. *Harcourt v. Peirson* 368

Old accounts found in the custody of the personal representative of a deceased tithe collector of a former rector, were received although there was no evidence to show by whom they were made out. *Ibid.*

The defendants set up a modus of 1*l.* 17*s.* 9*d.* as covering the tithes, of four townships in a parish, which were claimed by the plaintiff. The latter proved, by documents older than those produced by the defendants, that separate moduses, amounting to 1*l.* 17*s.* 9*d.* had been paid for separate portions of the four townships. Held that the modus pleaded was bad. *Ibid.*

4. In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants taken before the commissioners on the 1st day, but declined to read the examination taken on the 2d day. Ruled that the whole must be read. *Smith v. Biggs* 391

5. The evidence of a bankrupt which, in one respect is in his own favour, but in another respect, against himself, is receivable. *Ibid.*

6. A party cannot, at the hearing, give secondary evidence of the contents of a document in his adversary's possession, unless he has given him notice to produce it. The depositions are not sufficient notice. *Stulz v. Stulz* 460

7. In a tithe suit by a vicar; old overseers' accounts mentioning that a sum had been received by the vicar as for a modus; are admissible for the defendants. *Ward v. Pomfret* 475

8. In a tithe suit by a vicar, for small tithes, depositions of deceased witnesses, in an old suit by the rector, for great tithes of the parish, were received as evidence. *Ibid.* 477

EVIDENCE BEFORE THE MASTER.

The discretion given to the Master, by the 69th order, to examine witnesses *viva voce*, cannot be exercised after issuing the warrant on preparing his report. *Trotter v. Trotter*.

See STATE OF FACTS.—TITHES. 2384

EXAMINATION.

See BANKRUPT, 2.

EXECUTORS AND ADMINISTRATORS.

1. A. leased premises to B. for 10 years, and B. covenanted not to assign the premises without A.'s consent. A. agreed to grant to C. a lease for 10 years from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died before the lease was executed to him. A. filed a bill against C.'s execu-

tors (who admitted assets) for a specific performance of the agreement, and offered so to qualify the covenants of the lease as that the executors should be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Philips v. Everard* 102

2. When an annuity is security by a covenant and warrant of attorney, and all the arrears have been paid, the Court will not restrain the executors of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out. *Read v. Blunt* 567

3. After a decree in a creditors's suit, the Court will restrain a creditor of the testator from proceeding at law against the assets, but not from proceeding against the executors personally. *Kent v. Pickering* 569

4. If an executor or administrator pays into Court under an order in a cause, money which he had received from the deceased's estate, his right to retain a debt due to him from the deceased, is not prejudiced. *Langton v. Higgs* 228

See ANNUITY.—REPRESENTATION.

EXECUTORY DEVEISE.

See WILL, 4.

EXECUTORY TRUST.

See CONSTRUCTION, 7.

FEME COVERTE.

1. A married woman having power to dispose of property, by will executed as required by the power, but not referring to it, gave to her husband all the property which she might die possessed of, or have in reversion or in expectation: Held not to be an execution of the power. *Lempriere v. Valpy* 108

2. A woman entitled to a sum of stock, settled it, on her marriage, for her separate use, for life, with power to her to appoint it by will only, but no trust was declared, in default of appointment. After her marriage, she signed a promissory note, and then, by will, appointed the stock to her husband. *Semble*, that the holder of the note is not defeated thereby. *Nail v. Punter* 562

3. A gift for the separate use of a single woman, without anticipation, will not prevent alienation by her, unless it is made with reference to an intended marriage. *Brown v. Pocock* 663

FORECLOSED MORTGAGE.

Testator having a foreclosed mortgage in fee, of certain farms in Lancashire, gave, amongst other things, to his wife, for life, "the interest or proceeds of certain farms in the county of Lancaster, mortgaged to me for 2,500*l.*;" and, after her decease, "one third part of the sum of 2,500*l.* principal money disposed of in mortgage of the farms aforesaid" to his daughter Harriet; and he declared that, after his wife's decease, his daughter Elizabeth should inherit and enjoy the bequests aforesaid in the same proportion as her sister Harriet; and that his son should, in like manner, inherit and enjoy one third part of the aforesaid bequests, upon the same conditions as his daughters: Held that the farms passed, as real estate, to the testator's wife for life, with remainder to his son and daughters as tenants in common in fee. *Le Gros v. Cockerell* 384

See MORTGAGOR AND MORTGAGEE, 2.

FRAUD.

See BANKRUPT, 1.—RECEIVER.—REVERSION.

FRAUDULENT DEED.

See REVOCATION, 1.

FUND IN COURT.

See NOTICE.

HEIR.

In a suit to establish a will, one of the witnesses could not depose positively to the due attestation of it; and an issue was directed at the heir's request. The verdict was against the heir; but the Court gave him his costs both at law and in equity. *Wright v. Wright* 449

See INFANT TRUSTEE.—TRUST.

HUSBAND AND WIFE.

See BANKRUPT, 1.—DEBTOR AND CREDITOR, 1. 3.—FEME COVERTE.

IMPLICATION.

See CONSTRUCTION, 1.—CROSS LIMITATIONS.

INCLOSURE ACT.

The General Inclosure Act, so far as it enacts that the commissioner's oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory. *Casamajor v. Strobe* 87

An inclosure Act directed allotments to be made to A. as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as

rector, and for his right of common. Part of the waste had been used by the lord as a rabbit-warren, but no mention of it, as such, was made in the Inclosure Act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three allotments, as a full compensation for his rights above mentioned: Held, that A.'s title to the allotment in respect of the warren, could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil. *Ibid.*

INCUMBRANCE.

See PLEA AND PLEADING, 3.—PRIORITY.

INDEMNITY.

See VENDOR AND PURCHASER, 3.

INFANT.

See CONSTRUCTION, 4.

INFANT TRUSTEE.

Estates were conveyed to A. and B. and the heirs of A. A. died, having devised the estates to C. in Tail. C. alone, in B.'s life-time, conveyed the estates to D., to make him tenant to the *præcipe*, and a recovery was suffered to the use of C. in fee. D. died, leaving an infant heir. Held, that the heir was not a trustee, for, though the recovery did not bar the estate tail, it drew out from D. the whole estate that was vested in him, under the recovery-deed. *In re Debary* 283

INFORMATION.

1. A charity information relating to several small sums given to a company, by different donors, to be lent to different members of the company, is not multifarious. And, though the interest of one of the sums is payable to another company, that company is not a necessary party to the information: but this was reversed on appeal. *The Attorney-general v. The Merchant Tailors' Company* 288
2. A demurrer, for multifariousness, to an information, will not be allowed, because it contains general, sweeping charges, but the Court will direct a reference to the Attorney-general, to prevent the defendants from being unnecessarily harassed by those charges. *Ibid.*

See ANSWER, 3.—PLEA AND PLEADING, 4. 9.

INJUNCTION.

The Court will not grant a special injunc-

tion against the assignees of a bond to restrain an action brought by them in the name of the assignor. *Lord Portarlington v. Graham* 416

See ANNUITY.—Costs. 7. 9.—DEBTOR AND CREDITOR, 4. 5.—LANDLORD AND TENANT.

INSUFFICIENCY.

See ANSWER, 3.

INTEREST.

Interest is not payable on a sum recovered on a lost policy, from a life insurance company. *Bushnan v. Morgan* 635
See DEPOSIT.—TENANT FOR LIFE.

INTERPLEADER.

1. A. delivered goods to B., a wharfinger, to be kept for him; and afterwards directed B to transfer them to C., which was done. D. then gave notice to B. not to deliver the goods to any one but him, and thereupon B. refused to deliver the goods to C., upon which C. brought trover against B., and B. filed a bill of interpleader. Afterwards D. abandoned all claim to the goods and withdrew his notice. Held, that the case was a proper case of interpleader, and that D., who had occasioned the suit, must pay to the plaintiff, and the other defendants, their costs at law and in equity. *Mason v. Hamilton* 19
2. In interpleading suits it is not necessary for the defendants to enter into evidence as against each other. *The Thames and Medway Canal Company v. Nash* 280

INTERROGATORIES.

See DEMURRER, 4. 5.

JOINTURE.

See APPORTIONMENT.

JURISDICTION.

1. Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission may be made a rule of Court, on the application of either party, but that has not been done: Held, on demurrer, that this Court has jurisdiction to relieve against the award, and the Court having once exercised its jurisdiction over the award, will retain it, although, on the coming in of the answer, it appears that the submission had then been made a rule of a court of law by the defendant. *Nichols v. Roe* 156
2. The Vice-Chancellor has no jurisdiction under 11 Geo. 4, and 1 Will. 4, c. 60, in cases of lunatic trustees or mortgagees beyond directing the reference to the Master. Vol. V. 55

ter in the first instance. *Anonymous* 323
See CHARITY, 3.—DEFENDANT, 4.—MARSHAL OF KING'S BENCH.

LACHES.

Testator bequeathed a church lease for 21 years, to A. for life, remainder to his first and other sons, and directed the lease to be continually renewed by the persons in possession for the time being. A. neglected to renew, and the lease expired in 1798. His eldest son attained 21 in 1800. In 1830 A. died. In 1831 the eldest son filed his bill, praying to be compensated for the loss of the lease out of A.'s assets. Held, that he was entitled to the relief notwithstanding the lapse of time. *Bennett v. Colley* 181

LANDLORD AND TENANT.

A. granted a lease for 21 years, to B., with a proviso determining the lease and giving A. a right of re-entry, on non-performance of any of the covenants in the lease, and A. covenanted that at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of 14 years. B. paid all his rent, and continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A., in his answer, set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused. *Thompson v. Guyon* 65

LEASE.

See COVENANT.—LEACHES.—LANDLORD AND TENANT.—SPECIFIC PERFORMANCE, 1.

LEGACY.

1. Testator gave 6,000*l.* to each of his daughters then or thereafter to be born, payable at 21 or marriage, and directed that the portions of such of them as should die before they were payable, should sink into the residue; and after devising his real estates to his sons and daughters in strict settlement, he bequeathed the residue of his personal estate to trustees, in trust for such of his children as should first be entitled to his real estates. By a codicil, the testator gave to each of his daughters living at his decease, 1,000*l.* in addition to the 6,000*l.*, mentioned in his will, for the same uses, &c. as were mentioned therein. By a second codicil, which commenced and con-

cluded with the same words as the first, but did not refer to it, the testator gave, to each of his two daughters, 2,600*l.* in addition to the 6,000*l.* mentioned in his will, and directed that the portions of his children who should die before they became payable, should not fall into the residue, but go to his heir. The testator left two daughters. Held, that the legacies given to them by the codicils, were cumulative. *Watson v. Reed* 431

2. A legacy of 1,000*l.* "being part of the monies received by J. G. from my debtor A. G. but not remitted to me" is specific. *Nelson v. Carter* 530

3. A testator, before making his will, transferred two sums of four per cents. and five per cents., which were then the whole of his funded property, into the joint names of himself and his wife. By his will he bequeathed all his funded property or estate of what kind soever, to trustees, in trust for his wife for life, and, after her decease, in trust (amongst other things) to pay certain legacies of four per cent. stock, amounting, within 50*l.*, to the stock of that description, which he had so transferred; and he gave the residue of his estate to A. & B. He afterwards purchased further sums of five per cents., in the names of himself and his wife, and died in her lifetime, having no stock except that before mentioned, exclusive of which his property was not sufficient to pay his legacies: Held, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took, under the will, in certain parts of the testator's property. *Dummer v. Pitcher* 35

See REPUBLICATION.—WILL, 4.

LIMITATION OVER ON BANKRUPTCY.

See BANKRUPT, 1.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

The plaintiff, previous to his marriage with A.'s daughter, wrote a letter to A. inquiring what fortune his daughter was entitled to. A., in reply, wrote to the plaintiff, and stated that certain houses were entailed on his daughter, after his decease. A. died, leaving his daughter, his only child, and having devised all his real estates to his wife. It was then discovered that A. was tenant, in tail male, of the houses, with reversion to himself in fee. In

January 1816, the plaintiff and his wife filed a bill against A.'s widow (who was in possession of the houses), to have the houses conveyed to the plaintiff's wife, conformably to the representation in the letter, and for a receiver, and an injunction to stay proceedings at law. An injunction was granted, and the widow having put in her answer, the injunction was, in January 1818, continued. On the same day the plaintiff obtained an order to amend, but did not act upon it, or take any further proceedings, till May 1820. In April 1818, the widow mortgaged the houses, for 500 years, to H., and, in May 1819, she sold an annuity to M., and secured it by a conveyance of the houses to trustees in fee; and in May 1819 she sold and conveyed the houses, subject to the mortgage and annuity, to W. in fee. Neither H., W. nor M. had then any notice of the suit, or of the plaintiff's claim. In January 1820, at which time M. had notice, the houses were purchased by M., and conveyed to him by H. and W. In May 1820 the bill was amended. The widow having gone abroad without answering the amended bill, a decree was taken *pro confesso* against her in November 1822. In December following the plaintiff had notice of the conveyance to M., but did not make him a party to the suit, and opposed his attending the Master upon the inquiries directed by the decree. In March 1831, the plaintiff filed a bill against M., stating the proceedings in the original suit, and praying that M. might be decreed to convey the houses to the plaintiff's wife, and for a receiver. M. put in his answer, and relied on the delay in the proceedings of the original suit, the decree having been taken *pro confesso*, the want of notice in H. and W., and in himself when he purchased the annuity, and on the plaintiff not having made him a party to that suit; but the Court, on motion, granted a receiver. *Landon v. Morris* 247

LUNATIC TRUSTEE.

The Vice-Chancellor has no jurisdiction under 11 Geo. 4 and 1 Will 4, c. 60, in cases of lunatic trustees or mortgagees, beyond directing the reference to the Master in the first instance. *Anonymous* 322

MAINTENANCE.

See CONSTRUCTION, 4.

MARSHAL OF KING'S BENCH.

After a defendant had been attached by the sheriff for nonpayment of money, a writ of *habeas corpus cum causis*, issued in an

action brought against him in K. B., under which he was turned over, by a judge's order, to the marshal of K. B., who suffered him to escape. This Court, on motion, ordered the marshal to pay the money for which the Defendant had been attached. *Deves v. Boresford* 531

MASTER.

Where, under the usual decree for an account of a testator's debts, a claim is made in respect of a debt, the amount of which is not ascertained, the Master ought to take the necessary accounts for ascertaining the amount. *Baker v. Martin* 380

See CONDUCT OF SUIT.—DEFENDANT, 2, 6.
—EVIDENCE BEFORE THE MASTER.—JURISDICTION, 2.

MILLS.

See TITHES.

MODUS.

See TITHES, 3, 4.

MORTGAGE.

Devise of all testator's freehold estates, and all his farming stock, ready money, bills, bonds, notes and other securities for money, and all the residue of his personal estate, to trustees, their heirs, executors, &c. in trust to sell his real estates, and to sell, get in and convert into money all his personal estate, will pass a mortgage in fee. *Ex parte Barber, in re Tyas* 451

See FORECLOSED MORTGAGE.

MORTGAGOR AND MORTGAGEE.

1. A mortgagee in fee, died intestate as to the mortgaged premises, but having bequeathed her personal estate to B. The mortgage money remaining unpaid, B. presented a petition under 1. Will. 4, c. 60, praying that some person might be appointed, in the place of the mortgagee's heir, (who could not be found,) to convey the premises to him. But the court refused to make any order. *In re Stanley, deceased* 320
2. If, in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham v. Lord Shrewsbury* 395
3. A second mortgagee took a conveyance of the equity of redemption in consideration of the debts due to himself and the other mortgagees which he thereby took upon himself and covenanted to pay. Held that his debt was extinguished, and, therefore,

that in a foreclosure suit instituted against him, by the parties entitled to the first and third mortgages, he was not entitled to be paid his debt, in priority to the third mortgagee. *Brown v. Stead* 535

See JURISDICTION, 2.

MORTMAIN.

Testator bequeathed 5,000*l.* to a charitable institution, towards building almshouses. Testator, who was a member of the institution, knew that it was intended to build the almshouses, and that a piece of land had been offered to and accepted by the institution for that purpose, but no conveyance of the land had been executed, though the trustees were in possession at the testator's death, and, afterwards, the land was duly conveyed to the trustees. Held that the bequest was void. *Giblett v. Hobson* 651

MOTION.

See PRACTICE, 50.

MULTIFARIOUSNESS.

1. A charity information relating to several small sums given to a company, by different donors, to be lent to different members of the company, is not multifarious. And though the interest of one of the sums is payable to another company, that company, is not a necessary party to the information: but this was reversed on appeal. *The Attorney-general v. The Merchant Tailors' Company* 288
2. A demurrer, for multifariousness, to an information, will not be allowed, because it contains general, sweeping charges, but the Court will direct a reference to the Attorney-general, to prevent the defendants from being unnecessarily harassed by those charges. *The Attorney-general v. The Merchant Tailors' Company* 288
3. An information, after stating a will by which property was given to the defendants, for the purpose of making loans to young men free of the company, to assist them in trade and otherwise, alleged that divers other donations and bequests had been made to the company, for the purpose of making loans to young men, for their advancement in business, or in life, and prayed that the principal and all other like gifts, to the company, for loans, might be established, &c. Held that the information was multifarious, though the company were the only defendants to it. *The Attorney-general v. The Goldsmiths' Company* 670

NEW ORDERS.

1. The discretion given to the Master, by

the 69th order, to examine witnesses *viva voce*, cannot be exercised after issuing the warrant on preparing his report. *Trotter v. Trotter* 383

2. The 17th order does not apply to a commission to examine witnesses abroad. *The King of Spain v. Mendizbal* 596

See AMENDMENT, 2.—CONDUCT OF SUIT.—
DEFENDANT, 6.—DISMISSAL OF BILL, 1,
2, 3, 4, 5.

NEW TRUSTEE.

See PRACTICE, 8.

NOTICE.

A. being entitled to a reversionary interest in a fund in Court, assigns it to B. and, afterwards, to C. C. obtains an order that the fund shall not be transferred without notice to him, and has the order entered at the Accountant-general's office. Held, that he thereby gained priority over B., who had not taken similar precautions. *Greening v. Beckford* 195

See EVIDENCE, 6.—LIS PENDENS.—PRACTICE, 6.

OBLIGOR AND OBLIGEE.

See PRACTICE, 17.

OLD ACCOUNTS.

See TITHES, 3.

"OR" CONSTRUED "AND."

See CONSTRUCTION, 10.

ORDERS.

See NEW ORDERS.

OVERSEERS' ACCOUNTS.

See TITHES, 4.

PARISH BOOK.

See TITHES, 5.

PARTIES.

- Where estates have been conveyed to trustees, in trust for such of the creditors of the grantor as should execute the conveyance, and a bill is filed, by an incumbrancer (some of whose securities are prior and others subsequent to the trust-deed) praying that his rights and interests under his securities may be established, and the priorities of himself and the other incumbrancers, declared, all the creditors who have executed the conveyance, however numerous they may be, must be made parties to the suit. *Newton v. The Earl of Egmont* 130
- The drawer of an accommodation bill is a necessary party to a suit by the acceptor against the holder to have the bill deliver-

ed up to be cancelled. *Penfold v. Nunn* 405

See AGREEMENT.—DEFENDANT, 4.—MULTIFARIOUSNESS.—PLAINTIFF.—PLEA AND PLEADING, 6.

PARTNERSHIP.

In 1800, A., B. and C. entered into partnership as attornies, upon certain terms expressed in a memorandum. In 1808, A. died, leaving B. his executor and residuary legatee, and then B. and C. formed a partnership, and agreed to share the profits equally. In December 1825, their partnership was dissolved by consent. During the former partnership, A. and B. had made advances, both jointly and severally for C.'s private use; and, during the latter partnership, B. made similar advances. In 1827 B. became bankrupt. No settlement of accounts having taken place between any of the parties, in July 1831, B.'s assignees filed a bill, against B. and C. for an account of the dealings of both partnerships, and of all the advances made by A. and B. C. pleaded the Statutes of Limitations (21 Jas. 1. & 9 Geo. 4.) to so much of the bill as related to such advances. Held, that as the plea extended to the joint advances of A. and B. during the first partnership, it covered too much, and was therefore bad. *Robinson v. Field* 14

PAYMENT OF MONEY INTO COURT.

See DESTOR AND CREDITOR, 2.

PERSONAL ESTATE.

See CONVERSION.—COVENANT.

PERSONAL REPRESENTATIVE.

See REPRESENTATION.

PETITION.

See AFFIDAVIT.—PRACTICE, 15.

30.—TRUSTEE.

PIRACY.

See COPYRIGHT.

PLAINTIFF.

Persons not having a common interest in the subject of the suit, cannot be joined as co-plaintiffs. *Page v. Townsend* 395

See AMENDMENT, 2.—ANSWER, 2.—PRACTICE, 12, 14, 34.

PLEA AND PLEADING.

- In 1800 A., B. and C. entered into partnership as attornies, upon certain terms expressed in a memorandum. In 1808, A. died, leaving B. his executor and residuary legatee, and then B. and C. formed a

partnership, and agreed to share the profits equally. In December 1825 their partnership was dissolved by consent. During the former partnership A. and B. had made advances, both jointly and severally, for C.'s private use; and during the latter partnership B. made similar advances. In 1827 B. became bankrupt. No settlement of accounts having taken place between any of the parties, in July 1831, B.'s assignees filed a bill against B. and C., for an account of the dealings of both partnerships, and of all the advances made by A. and B. C. pleaded the Statutes of Limitations (21 Jas. 1, & 9 Geo. 4.) to so much of the bill as related to such advances. Held, that as the Plea extended to the joint advances of A. & B. during the first partnership, it covered too much, and was, therefore, bad. *Robinson v. Field* 14

2. To a creditor's bill, the defendants pleaded a decree obtained by other creditors in a prior suit. Plea over-ruled; the decree being less beneficial to the plaintiffs than they might obtain in their own suit. *Pickford v. Hunter*. 122

3. Where estates have been conveyed, to trustees in trust for such of the creditors of the grantor as should execute the conveyance, and a bill is filed, by an incumbrancer, (some of whose securities are prior, and others subsequent to the trust-deed,) praying that his rights and interests under his securities, may be established, and the priorities of himself and other incumbrancers, declared, all the creditors who have executed the conveyance, however numerous they may be, made parties to the suit. *Newton v. The Earl of Egmont* 130

4. An information stated certain bequests to have been made to the defendants, upon certain trusts, and that other bequests had been made to them upon like trusts. The defendants pleaded a will, containing a bequest to the defendants, upon a like trust, (but in which another company was interested,) and that that company was not a party to the suit. Plea over-ruled. *The Attorney-general v. The Merchant Tailors' Company* 323

5. Persons not having a common interest in the subject of the suit, cannot be joined as co-plaintiffs. *Page v. Townsend* 395

6. Defendant, in his answer, insisted that he was entitled to be reimbursed, by A., what he might be decreed to pay to the plaintiff, and that therefore, A. was a necessary party; and accordingly, the Court, at the hearing, ordered the cause to stand over, with liberty to amend. Plaintiff did not amend, but filed a supplemental bill against A. alone, praying the same relief as in the original bill. The two causes were heard together,

when it was objected that the plaintiff ought to have amended the original bill, or made the original defendant a defendant to the supplemental bill. But the objection was over-ruled. *Greenwood v. Atkinson* 419

7. To a bill claiming title to an estate the defendant pleaded that the title of the party through whom the plaintiff claimed, accrued in 1759, and that the possession of the estate had been ever since adverse to the plaintiff, and to the persons through whom he claimed. Plea over-ruled because it did not state particularly the facts on which the defendant meant to rely as constituting the adverse possession, and therefore the plaintiff could not know what case he had to meet. *Hardman v. Ellames* 640

8. A plea of adverse possession to a bill charging that the defendant has in his custody documents showing the plaintiff's title, must be accompanied by a plea denying that charge. *Ibid.* 640

9. An information, after stating a will by, which property was given, to the defendants, for the purpose of making loans, to young men free of the company, to assist them in trade and otherwise, alleged that divers other donations and bequests had been made, to the company, for the purpose of making loans, to young men, for their advancement in business or in life, and prayed that the principal and all other like gifts, to the company, for loans, might be established, &c. Held, that the information was multifarious, though the company were the only defendants to it. *Attorney-general v. The Goldsmiths' Company* 670

See AGREEMENT.—DEMURRER 1.—MULTIFARIOUSNESS.—PARTIES, 2.—REVIVOR.

POLICY OF INSURANCE.

See INTEREST.

PORCTIONS.

1. Where, under a settlement a sum of money is to be raised out of real estates, for the portions of younger children, and some of the portions have become payable, the Court will raise the whole sum at once, although some of the children have not acquired vested interests. *Gilibrand v. Gold* 149

2. W. bequeathed 5,000*l.* to the daughter of his brother J., charged on his real estates, and directed the interest to be raised for her maintenance, if J. should so direct; and he devised his real estates so charged, to J. in fee. J. bequeathed 10,000*l.*, in trust for his daughter for life, and after her death, in trust for her children, and declared that that sum should be in addition to the sums which

she was entitled to under W.'s will. The daughter afterwards married. Her father advanced to her husband 15,000*l.* as his daughter's marriage portion, and, by the settlement, pin-money and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property, and the 15,000*l.* was declared to be in satisfaction of the sums which the wife was entitled to under W.'s will. Held that the 10,000*l.* was not satisfied by the marriage portion. *Wharton v. Lord Durham* 297

3. Testator gave 5,000*l.* to trustees, in trust for his daughter E., for life, and after her death, in trust to apply the interest for the maintenance of all her children as should be living at her death, during their minorities, and on their attaining 21, in trust to transfer the same equally between them. But if E. should die without leaving any such child, or leaving such they should all die under 21, then to transfer the same unto such children of F., as should be living at E.'s death without issue. One of E.'s children attained 21, but died in E.'s lifetime. Held that that child did not take a vested interest. *Tucker v. Harris* 538

See LEGACY, 1.

POWER.

A married woman having power to dispose of property, by her will executed as required by the power, but not referring to it, gave, to her husband, all the property which she might die possessed of, or have in reversion or in expectation: Held not to be an execution of the power. *Lempriere v. Valpy* 108

See APPOINTMENT.—PROBATE DUTY.

PRACTICE.

1. Plaintiff amended his bill; before the amendments were answered, the suit abated. Plaintiff then filed a bill of revivor and supplement, praying that the defendants might answer that bill, together with the amendments. The defendants put in an answer to the bill of revivor and supplement only. Motion to take the answer off the file, for irregularity, refused. *Sayle v. Graham* 8
2. An affidavit in support of a motion for a serjeant-at-arms, under 11 Geo. 4 and 1 Will. 4, c. 36, Rule 1, which relates to the defendant's residence and not to the place where he was at the issuing of the attachment, is insufficient. *Davis v. Hammond* 9
3. In computing the eight days within which cause must be shown against confirming a report absolutely, the day on which the order *Nisi*, was served, must be reckoned, but if the eighth day is a holiday, one day more will be allowed. But see the note at the end of this case. *Manners v. Bryan* 147
4. A bill had been dismissed for want of prosecution. Before the costs were paid, the defendant died, and the plaintiff filed another bill, for the same object, against the defendant's executor. The proceedings in the latter suit were stayed, until the costs of the former were paid. *Spires v. Sewell* 193
5. Plaintiff had examined a witness respecting a conversation between defendant and witness. Plaintiff declined to read the deposition at the hearing of the cause, as it made against him. Defendant then proposed to read the deposition as his evidence. But the Vice-Chancellor ruled that the defendant was not at liberty to read the deposition, as it was not evidence for the defendant as to whose conversation it related. *Wilson v. Calvert* 194
6. Defendant on the expiration of his time for answering, lodged a petition at the Rolls, for further time: and gave notice of his having so done to the plaintiff's clerk in court. Afterwards, without revoking the notice, he filed a demurrer. Ordered that the demurrer should be taken off the file. *Murray v. Cauty* 230
7. In computing the time within which a bill may be dismissed, on the ground of no proceedings having been taken since the answer was filed, the intervals mentioned in the 19th amended order are not to be reckoned. *The Attorney-general v. Jones* 246
8. A new trustee appointed under 11 Geo. 4, and 1 Will. 4, c. 60, without a reference to the Master, the petitioner being the only person interested in the trust property. *Ex parte Shick* 281
9. A. & B., an infant, file a bill. B. attains 21, and gives notice to the parties, that he repudiates the suit, and then dies. A. revives the suit. The defendants answer the bill of revivor, and insist that, B. having repudiated the suit, it ought not be revived; and they then move to discharge the order of revivor, for irregularity. Motion refused, because the defendants ought to have pleaded to, and not answered the bill of revivor. *Codrington v. Houlditch* 286
10. A decree declared a defendant, against whom the bill had been taken *pro confesso*, to be a trustee of stock for the plaintiffs: but the Court declined to refer it to the Master to appoint a person to transfer the stock, in the place of the defendant, except upon a petition to be presented under 11 Geo. 4, and 1 Will. 4, c. 60. *Feloves v. Tyl* 319
11. The discretion given to the Master, by the 69th order, to examine witnesses *via voce*, cannot be exercised after issuing the

- warrant on preparing his report. *Trotter v. Trotter* 383
12. A plaintiff cannot read the cross-examination of one of the defendant's witnesses, if the defendant declines to read the examination in chief. *Smith v. Biggs* 391
13. If in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham v. Lord Shrewsbury* 395
14. The Court will not, on motion by a defendant, compel a plaintiff to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to answer the bill. *Penfold v. Nunn* 409
15. Under the Charity Petition Act, where one order has been made on petition, a subsequent order may be obtained on motion. *In re Chipping Sodbury School* 410
16. The Court will not grant a special injunction to restrain an action brought, by the assignees of a bond, in the name of the assignor. *Lord Portarlington v. Graham* 416
17. The assignee of a bond brought an action on the bond, in the name of the obligee. The obligor filed a bill against the obligee and the assignee, to restrain the action. The former being abroad, the Court made the usual order for service of the subpoena, on the attorney in the action. *Ibid.* 418
18. An order for the discharge of a prisoner from his contempt, under 2 & 3 Will. 4, c. 58, may be made upon motion, supported by the certificate of the deputy warden of the Fleet. *Hodder v. Haines* 441
19. Notwithstanding the Master may have refused an application, under the 56th order, to take the prosecution of a decree from the plaintiff, and commit it to another party, the Court is at liberty to grant the application, the Master's judgment not being final. *Wyatt v. Sadler* 450
20. A party cannot, at the hearing, give secondary evidence of the contents of a document in his adversary's possession, unless he has given him notice to produce it. The depositions are not sufficient notice. *Stulz v. Stulz* 460
21. Course of proceeding to be followed by a defendant, where the plaintiff, after serving a subpoena to rejoin, does not proceed with the cause. *Anonymous* 497
22. In a case of cause and cross cause, where the plaintiff in the former is abroad or cannot be found, the proper course is to stay the proceedings in that suit until the plaintiff has answered the cross bill, and not to order the subpoena to answer the cross bill to be served on his clerk in court in the original cause. *Waterton v. Croft* 502
23. Motion for leave to serve a subpoena on a defendant resident in Scotland granted. *Parker v. Lloyd* 508
24. In a suit against the Bank and an administrator appointed under 38 Geo. 3, c. 87, the Court, on motion before decree, ordered stock standing in the testator's name, to be transferred to the Accountant-general. *Warburton v. Hill* 532
25. Defendant to a bill of discovery in aid of an action, ordered to produce, at the trial, documents set forth, in the schedule to his answer, as being in his custody. *Crowley v. Perkins* 552
26. Proceedings in the original cause stayed, until the plaintiff had appeared to and answered the cross bill. *Bourne v. Hall* 552
27. Under the new orders of 1831, an order to amend, obtained after notice of motion to dismiss, but served before the motion is made, is an answer to the motion; but the plaintiff must pay the costs of the motion. *Peacock v. Sievier* 553
28. After the depositions on a state of facts carried in under a decree, have been published, no other person, whether a party to the cause or not, can be examined as a witness, without an order of the Court warranted by special circumstances. *Winpenny v. Courtney* 554
29. If the 8th day after service of an order *Nisi* for confirming a report is a Sunday, that day is not to be reckoned. *Milburn v. Lyster* 565
30. Order made in a cause, after the bill had been dismissed, that the receiver should pass his accounts and pay the balance to the defendant. *Pitt v. Bonner* 577
31. It is not necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, should state either the names of the witnesses, or the matters to which they are to be examined, in a case where it is evident that such examination is necessary. *Carbonell v. Bessell* 636
32. A cause may be advanced for the purpose of taking the bill *pro confesso*. *Barwick v. Ward* 676
33. Defendant, after putting in his answer, became bankrupt. Plaintiff, before the assignees were brought before the Court, obtained an order to refer the answer for scandal and impertinence. Held that the order was regularly obtained. *Booth v. Smith* 639
34. Plaintiff, after defendant had answered, amended by adding another defendant. After that defendant had answered, plaintiff again moved to amend, not requiring any answer from the original defendant. Motion granted. *Evans v. Hughes* 666
35. The solicitor for some of the defendants

was agent for the rest. The former were entitled to move to dismiss, and they moved accordingly; but no order could be made, as the time for the other defendants to answer the amendments had not expired. Motion refused with costs, as the solicitor must have known that the motion could not succeed. *Partington v. Baillie* 667

36. Threatening defendants who have not answered, with an attachment, without issuing one, is not using due diligence, to get in their answers, so as to prevent another defendant from moving to dismiss. *Gully v. Van Bodicote* 668

37. A defendant may move to dismiss after the expiration of two months from the time when his answer was to be deemed sufficient, although, owing to the answers of the other defendants not being filed, the time for amending the bill has expired. *Ibid.*

See AMENDMENT.—COSTS.

PRINTS.

Prints engraved and struck off abroad, but published here, are not protected from piracy *Page v. Townsend* 395

PRIORITY.

1. A. being entitled to a reversionary interest in a fund in Court, assigns it to B. and, afterwards, to C. C. obtains an order that the fund shall not be transferred without notice to him, and has the order entered at the Accountant-general's Office. Held that he thereby gained priority over B., who had not taken similar precautions. *Greening v. Beckford* 195

2. A second mortgagee took a conveyance of the equity of redemption, in consideration of the debts, due to himself and the other mortgagees, which he thereby took upon himself and covenanted to pay. Held that his debt was extinguished, and, therefore, in a foreclosure suit instituted against him by the parties entitled to the first and third mortgages, he was not entitled to be paid his debt in priority to the third mortgagee. *Brown v. Stead* 535

See PARTIES, 1.

PRISONER.

See CONTEMPT, 2, 3. 4.—MARSHAL OF KING'S BENCH.

PRO CONFESSO.

A cause may be advanced for the purpose of taking the bill *pro confesso*. *Barwick v. Ward* 676

See CONTEMPT, 2, 3.

PROBATE DUTY.

1. Where a testator having a general power of appointment over a fund, exercises it by will, probate-duty must be paid in respect of the fund. *Palmer v. Whitmore* 178

2. A married woman having a testamentary power to appoint a fund, exercised it in favour of her husband, and appointed him her executor. Held that, if the husband claimed the fund as his wife's executor, he must pay probate duty on the fund. *Nail v. Punter* 563

PRODUCTION OF DOCUMENTS.

1. The Court will not, on motion by a defendant, compel a plaintiff to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to answer the bill. *Penfold v. Nunn* 409

2. Defendant to a bill of discovery in aid of an action, ordered to produce, at the trial, documents set forth in the schedule to his answer as being in his custody. *Crowley v. Perkins* 552

See TITHES, 4.

PROMISSORY NOTE.

See FEME COVERTE, 2.

PUBLICATION.

See PRACTICE, 28.

PURCHASER.

See LIS PENDENS.—VENDOR AND PURCHASER.

RECEIVER.

1. Testator bequeathed the residue of his real and personal estate to his widow, her heirs, executors and administrators: "having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease." The testator's widow died intestate. The bill alleged that the testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of his property in favour of the plaintiffs, who were natural children of the testator. The Court, on motion, supported by affidavits verifying the allegation, granted a receiver of the real estates, against the heir and second husband of the widow. *Podmore v. Gunning* 485

2. A receiver having, without the sanction of the Court, defended actions arising out of a distress for rent made by him on a tenant of the estate, the Court refused to allow him his costs of the actions. *Swaby v. Dickon* 629

See LIS PENDENS.—PRACTICE, 29.

RECOVERY.

1. Estates were conveyed to A. and B. and the heirs of A. A. died, having devised the estates to C. in tail. C. alone, in B.'s life-time, conveyed the estates to D., to make him tenant to the *præcipe*, and a recovery was suffered to the use of C. in fee. D. died, leaving an infant heir. Held that the heir was not a trustee: for, though the recovery did not bar the estate tail, it drew out from D. the whole estate that was vested in him, under the recovery-deed. *In re Debury* 283
2. A devised estates of which he had only the equitable fee, and afterwards agreed to sell part of the estates, and, to remove an objection taken by the purchaser, but which was not well founded, he suffered a recovery. Held that though the recovery was an equitable one, and the purpose for which it was suffered was expressly mentioned in the deed declaring the uses, and though the limitations thereby made of the property not intended to be sold, were precisely the same as before the recovery, and were expressed to be in restoration and confirmation of them, the will was revoked. *Locke v. Foote* 618

RE MOTENESS.

See CONSTRUCTION, 5.

RENEWAL.

See LACHES.—LANDLORD AND TENANT.

RENT-CHARGE.

- A., on his marriage, grants a rent-charge, to his wife, out of his estates, for her jointure; which he secures by a term limited to trustees. By his will, he gives his mansion-house and park, to his wife, for life, and the rest of his estates, to B., and directs that the repairs, painting, &c. of his mansion-house shall be paid for, by sale of timber on the premises devised to B., and then he confirms the settlement. Held that the jointure is wholly raiseable out of those premises *Grigby v. Powell* 290

REPORT.

See PRACTICE, 3. 29.

REPRESENTATION.

Semble that, where a testator's will is proved in a perogative court, and his executor's will is proved in a diocesan court, the executor of the executor is not the personal representative of the original testator. *Jernegan Baxter* 568

REPUCLICATION.

Testator having estates in Jamaica and Eng-
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land, by his will, directed his English estates to be sold, and 10,000*l.* to be paid, out of the produce, to the plaintiff. He afterwards sold his English estate, and, by an unattested codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the plaintiff, and charged all his estates with the payment thereof. He then made another codicil, which was duly attested, and in which he referred to his will, and ratified and confirmed all the provisions and bequests which he had thereby made in the plaintiff's favour. Held that the Jamaica estates were liable to the payment of the 10,000*l.* *Gordon v. Lord Reay* 274

RESTRAINT ON ALIENATION.

See FEME COVERTE, 3.

RETAINER.

See DEBTOR AND CREDITOR, 2.

REVERSION.

- A sale by private contract of a reversionary interest in a sum of stock, set aside, on account of inadequacy of price, and the unjust and oppressive conduct of the purchaser. *Newton v. Hunt* 511
See PRIORITY, 1.

REVIVOR.

- A. and B., an infant, file a bill. B. attains 21, and gives notice to the parties, that he repudiates the suit, and then dies. A. revives the suit. The defendants answer the bill of revivor, and insist that, B. having repudiated the suit, it ought not to be revived; and they then move to discharge the order of revivor, for irregularity. Motion refused, because the defendants ought to have pleaded to, and not answered the bill of revivor. *Codrington v. Houlditch* 286

REVOCATION.

1. A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson v. Walker* 1
2. A. devised estates of which he had only the equitable fee, and afterwards, agreed to sell part of the estates, and to remove an objection taken by the purchaser, but which was not well founded, he suffered a recovery. Held, that, though the recovery was an equitable one, and the purpose for which it was suffered, was expressly mentioned in the deed declaring the uses, and though the limitations thereby made of the property not intended to be sold, were precisely the same as before the recovery, and were expressed to be in

restoration and confirmation of them, the will was revoked. *Locke v. Foote* 618

SATISFACTION.

W. bequeathed 5,000*l.* to the daughter of his brother J. charged on his real estates, and directed the interest to be raised for her maintenance, if J. should so direct; and he devised his real estates so charged, to J. in fee. J. bequeathed 10,000*l.*, in trust for his daughter for life, and after her death, in trust for her children, and declared that that sum should be in addition to the sums which she was entitled to under W.'s will. The daughter afterwards married. Her father advanced to her husband 15,000*l.* as his daughter's marriage portion, and, by the settlement, pin-money and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property, and the 15,000*l.* was declared to be in satisfaction of the sums which the wife was entitled to under W.'s will. Held that the 10,000*l.* was not satisfied by the marriage portion.

Wharton v. Lord Durham 297

See LEGACY, 1.

SCANDAL AND IMPERTINENCE.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before the assignees were brought before the court, obtained an order to refer the answer for scandal and impertinence. Held that the order was regularly obtained. *Booth v. Smith* 639

SECONDARY EVIDENCE.

See PRACTICE, 20.

SEPARATE PROPERTY.

A gift for the separate use of a single woman, without anticipation, will not prevent alienation by her, unless it is made with reference to an intended marriage. *Brown v. Pocock* 663

See FEME COVERTE, 1, 2.

SHERIFF.

The bill had been dismissed at the hearing, with costs, which the plaintiff refusing to pay, he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody, upon bail, but re-took him before the writ was returnable. The Court refused to order the sheriff to pay the costs. *Collard v. Hare* 10

SOLICITOR AND CLIENT.

The plaintiff had obtained an order for

taxation of his solicitor's bill amounting to 399*l.* The solicitor, with the Master's permission, struck out certain items, as having been inserted by mistake. The bills were then taxed, and less than a sixth was taken off, but if the items struck out were included, then more than a sixth would have been taken off. Held, that as less than a sixth had been taxed off, the plaintiff must pay the costs of taxation. *Marshall v. Oxford* 456

SPECIFIC LEGACY.

See LEGACY, 2, 3.

SPECIFIC PERFORMANCE.

1. A leased premises to B. for 10 years; and B. covenanted not to assign the premises, without A.'s consent. A. agreed to grant to C. a lease for 10 years, from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died, before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets), for a specific performance of the agreement, and offered so to qualify the covenants of the lease, as that the executors should be no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Philips v. Excrard* 102
2. A. granted a lease for 21 years to B. with a proviso determining the lease and giving A. a right of re-entry on non-performance of any of the covenants in the lease, and A. covenanted that, at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of 14 years. B. paid all his rent and continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A., in his answer set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused. *Thompson v. Guyon* 65

See AGREEMENT.—VENDOR AND PURCHASER, 2.

STAMP DUTY.

See PROBATE DUTY.

STATE OF FACTS.

After the depositions on a state of facts

carried in under a decree have been published, no other person, whether a party to the cause or not, can be examined as a witness, without an order of Court, warranted by special circumstances. *Winpenny v. Courtney* 554

STATUTE 11 G. 4 & 1 W. 4, c. 60.

See JURISDICTION, 2.—MORTGAGOR AND MORTGAGEE.—TRUSTEE.

STATUTE OF LIMITATIONS.

See PARTNERSHIP.

STOCK.

See PRACTICE, 24.

SUBPŒNA.

Motion for leave to serve a subpœna on a defendant resident in Scotland granted.

Parker v. Lloyd 508

See PRACTICE, 17. 22.

SUPPLEMENTAL ANSWER.

Leave given to file a supplemental answer to correct a mistake in the original answer. *White v. Sayer* 566

SUPPLEMENTAL BILL.

Defendant, in his answer, insisted that he was entitled to be reimbursed by A. what he might be decreed to pay to the plaintiff, and, therefore, that A. was a necessary party, and, accordingly, the Court, at the hearing, ordered the cause to stand over, with liberty to amend. Plaintiff did not amend, but filed a supplemental bill, against A. alone, praying the same relief as in the original bill. The two causes were heard together, when it was objected that the plaintiff ought to have amended the original bill, or made the original defendant a defendant to the supplemental bill. But the objection was over-ruled. *Greenwood v. Atkinson* 419

SURPLUS RENTS.

See CHARITY, 1, 2. 4.

TENANT FOR LIFE.

A tenant for life subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber cut by order of the Court. *Tooker v. Annesley* 235

TENANT FOR LIFE AND REMAINDER-MAN.

1. Testator bequeathed a church lease for

21 years, to A. for life, remainder to his first and other sons, and directed the lease to be continually renewed by the persons in possession for the time being. A. neglected to renew, and the lease expired in 1798. His eldest son attained 21 in 1800. In 1830 A. died. In 1831 the eldest son filed his bill, praying to be compensated for the loss of the lease, out of A.'s assets. Held, that he was entitled to the relief, notwithstanding the lapse of time. *Bennett v. Colley* 181

2. A. having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject as to the latter, to the payment of his debts, to trustees, for B. for life with several limitations over. A. died before the time expired, leaving the covenant unperformed in part. Held that his general personal estate was liable to the performance of the covenant. *Marshall v. Holloway* 198

TERRIER.

See TITHES.

TIMBER.

A tenant for life subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber cut by order of the Court. *Tooker v. Annesley* 235

TITHES.

1. A new mill erected on the site of an ancient mill, is exempt from tithes: but, if it is built partly on the site of the ancient mill, and partly on a new site, it is not exempt. *Newcome v. Matthee* 213
In a suit for tithes between a vicar and the occupier of a mill, an old map of the parish, belonging to the lord of the manor, was not admitted as evidence for the defendant. *Ibid.*

2. In a suit for tithes, by a rector, against the owner and occupier of a farm, part of the demesnes of a manor of which the owner was lord, he, in order to prove that he was entitled to two thirds of the tithes of the farm, produced a grant, from Queen Elizabeth, to one of his ancestors, of a chapel with the tithes belonging to it within the lordship, and also his title-deeds, in some of which tithes, in others tithes of corn, grain, and in others tithes and portions of tithes in the parish and several other places, were conveyed, but in none of them were the tithes of the farm mentioned specially, except in an old lease of the farm, in which the lord's part of the tithes, together with ingress, egress, &c. were

reserved. The witnesses proved that one third only of the tithes of the farm and the rest of the demesnes, had been paid to the plaintiff and his predecessors, and that one of them, having employed a person to value the tithes of the parish, pointed out, to the valuer, the farm and other demesnes as being titheable in the thirtieth only. The Court refused to decree an account, until the plaintiff had established his right, at law. *Hughes v. Davis* 331

3. In a suit for tithes by an ecclesiastical rector against the occupiers, a terrier signed by the vicar, churchwardens and inhabitants, and which was tendered by the defendants, was rejected. *Harcourt v. Peirson* 368

Old accounts found in the custody of the personal representative of a deceased tithe collector of a former rector, were received, although there was no evidence to show by whom they were made out. *Ibid.*

The defendants set up a modus of 1*l.* 17*s.* 9*d.* as covering the tithes of four townships in a parish, which were claimed by the plaintiff. The latter proved, by documents older than those produced by the defendants that separate moduses, amounting to 1*l.* 17*s.* 9*d.*, had been paid for separate portions of the four townships. Held that the modus pleaded, was bad. *Ibid.* 368

4. In a tithe suit, by a vicar, old overseers' accounts, mentioning that a sum had been received, from the vicar, as for a modus, are admissible for the defendants. *Ward v. Pomfret* 475

5. Plaintiff had subpoenaed the defendants' agent to produce, at the hearing, a parish book in his custody. Held that, as it was a public document and in possession of the defendants' agent, the defendants were entitled to have it produced and read at the hearing, for their benefit. *Ibid.* 476

6. In a tithe suit, by a vicar, for small tithes, depositions of deceased witnesses in an old suit, by the rector, for great tithes of the parish, were received as evidence. *Ibid.* 477

See COMPENSATION.

TITLE.

See VENDOR AND PURCHASER, 1.

TRUST.

Testator bequeathed the residue of his real and personal estate, to his widow, her heirs, executors and administrators: "having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property, after her decease." The

testator's widow died intestate. The bill alleged that the testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of his property in favour of the plaintiffs, who were natural children of the testator. The Court, on motion, supported by affidavits verifying the allegation, granted a receiver of the real estates, against their heir and second husband of the widow. *Podmore v. Gunning* 485

See CONSTRUCTION, 1.—TRUSTEE.—WILL, 2. 6. 7, 8, 9.

TRUSTEE.

1. A new trustee appointed under 11 Geo. 4. and 1 Will. 4, c. 60, without a reference to the Master, the petitioner being the only person interested in the trust-property. *Ex parte v. Shick* 281

2. A decree declared the defendant, against whom the bill had been taken *pro confesso*, to be a trustee of stock for the plaintiffs: but the Court declined to refer it to the Master to appoint a person to transfer the stock, in the place of the defendant, except upon a petition presented under 11 Geo. 4, and 1 Will. 4, c. 60. *Felloses v. Till* 319

3. A mortgagee in fee died intestate as to the mortgaged premises, but having bequeathed her personal estate to B. The mortgage money remaining unpaid, B. presented a petition under 11 Geo. 4, and 1 Will. 4, c. 60, praying that some person might be appointed, in the place of the mortgagee's heir (who could not be found,) to convey the premises to him. But the Court refused to make any order. *In re Mary Stanley, deceased* 320

4. A. and B. claimed, adversely, a sum of stock standing in the names of A. and two other persons, as trustees. A. filed an amicable bill, to have the rights and interests of himself and B. declared. A. was beyond sea, commanding a merchant vessel, on a voyage to India. B. presented a petition under 11 Geo. 4 and 1 Will. 4, c. 60, praying that the stock might be transferred into Court, in the cause. Petition refused, the case not being within the Act. *Hutchinson v. Stevens and others* 498

5. Testator gave an annuity to his widow, and the residue of his estate to his children. The executors paid the testator's debts and legacies, and purchased stock, in their names, to answer the annuity, and paid the dividends to the widow. One of the executors went to reside abroad, and the other died: Held that they were trustees of the stock within 11 Geo. 4 and 1 Will. 4, c. 60. *Ex parte Dover* 500

See INFANT TRUSTEE.—JURISDICTION, 2.—
MORTGAGE, 1—TRUST.

TRUSTEE AND CESTUI QUE TRUST.

Stock was settled on a wife, for her separate use for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree under which the trustees transferred part of the stock into Court, and they were allowed time to transfer the remainder. The wife died, having, by her will, appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees, and his assignees claiming the stock under the appointment, and praying the same relief as his wife might have had. But as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail v. Punter* 555

See TRUST.

VENDOR AND PURCHASER.

1. The General Inclosure Act, so far as it enacts that the commissioner's oath and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory. *Casamajor v. Strode* 87
2. An Inclosure Act directed allotments to be made to A., as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as rector, and for his right of common. Part of the waste had been used by the lord as a rabbit warren, but no mention of it, as such, was made in the Inclosure Act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three other allotments as a full compensation for his rights above mentioned. Held that A.'s title to the allotment in respect of the warren, could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil. *Ibid.* 87
3. Vendor filed a bill for specific performance, but, not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Lord Anson v. Hodges* 227
4. A. agreed to sell an estate tithe-free to B. Afterwards C., the vicar of L (in which parish part of the estate was sit-

uate) filed a bill, for tithes against the occupiers of another part of the estate, as also being situate in L. A. agreed that part of the purchase money should be set apart as an indemnity to B. against the claim made by C., which was accordingly done, and B. paid the remainder of his purchase-money, and took a conveyance of the estate. C. died, and his suit was dismissed for want of prosecution, but the indemnity fund was not transferred to A. One of C.'s successors instituted a fresh suit for the tithes of the same lands. Pending these proceedings it was discovered that those lands were situate in the parish of S., and were titheable to the rector of S., and, on proof of those facts, the latter suit was dismissed at the hearing. Held that B. was entitled to a compensation out of the fund for the tithes of the lands situate in S. *Crompton v. Lord Melbourne* 353

5. A sale, by private contract, of a reversionary interest in a sum of stock, set aside, on account of inadequacy of price, and the unjust and oppressive conduct of the purchaser. *Newton v. Hunt* 511

See LIS PENDENS.

VESTING.

See CONSTRUCTION, 2.—PORTIONS, 3.

VICE-CHANCELLOR.

See LUNATIC TRUSTEE.

WHARFINGER.

See INTERPLEADER, 1.

WILL.

1. A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson v. Walker* 1
2. Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the said dividends to his brother A., to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, and upon the demise of the annuitants or any of them, the testator gave each annuitant's proportion of the before-mentioned dividends, to his brother A., to be at his disposal, but the principal to remain in the Bank. Held, that no trust was created for the children of F., but that A. took, absolutely, the capital of the testator's stock, subject to the annuities. *Benson v. Whittam* 22
3. A testator, before making his will, transferred two sums of four per cents. and five per cents, which were then the whole of his funded property, into the joint names of himself and his wife. By his will he

- bequeathed all his funded property or estate of what kind soever, to trustees, in trust for his wife for life, and, after her decease, in trust (amongst other things) to pay certain legacies of four per cent. stock, amounting, within 50*l.*, to the stock of that description, which he had so transferred; and he gave the residue of his estate to A. and B. He afterwards purchased further sums of five per cents, in the names of himself and his wife, and died in her lifetime, having no stock except that before-mentioned, exclusive of which his property was not sufficient to pay his legacies: held that the wife, on her husband's death, became absolutely entitled to the stock: and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took, under the will, in certain parts of the testator's property. *Dummer v. Pitcher* 35
4. Testator devised all his real estates to trustees, in trust to convey his lands in W. to A., when, and so soon as he should attain 21, but in case he should die under that age and without leaving issue, then over; and, when B. should attain 21, in trust to convey the rest of the real estates to him, on his giving security for the annuities given by the testator, and executing certain deeds, to the satisfaction of the trustees; but in case B. should die before he attained 21, without leaving issue, then over. A. and B. were both infants at the testator's death: held that A. took a vested interest in possession, in the lands in W., but that B.'s interest in the rest of the estates was contingent on his attaining 21, and doing the acts required. *Phipps v. Williams* 44
5. Testatrix bequeathed her residue, in trust for her daughter Caroline for life, and after her death, for her granddaughter if she should survive her mother, and attain 21, but in case she should not survive her mother, and attain 21, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death as they attained 21, and if all such other children of the testatrix's said daughter, should die before attaining 21, then in trust for L. M. The granddaughter attained 21, but did not survive her mother. Another child of the testatrix's daughter attained 21, but did not survive his mother; afterwards the daughter died. Held, that the bequest over to L. M. took effect. *Mackinnon v. Sewell* 78
6. Testator gave his real and personal estates to his wife, for life, remainder to his great-nephew, F. W. son of his late nephew, and expressed it to be his particular wish and request that his wife, together with F. W.'s grandfather, should superintend and take care of his education, so as to fit him for any respectable profession or employment: held, that F. W. was entitled to be maintained and educated, during his minority, in the manner described, out of the income of the testator's estates. *Foley v. Parry* 138
7. Testator bequeathed his residuary estate to trustees, in trust for his wife for life, and, after her decease: "to preserve the then remaining part of my estate for the grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of 25 years; and when the youngest shall have attained the age of 25 years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and brother, surviving; eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards. Held that the bequest was not void for remoteness; but that those only of the grandchildren who were in existence at the widow's decease, were entitled to share in the testator's residuary estate. *Kevern v. Williams* 171
8. Testator gave all his property to trustees, in trust to invest it in securities at interest, for the use of his nephew, to be paid at such time and in such manner as the trustees should think fit; and when the nephew should attain 21, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands, as they might think most for his advantage, in weekly or quarterly payments, for his life. Held that the nephew took an absolute interest in the property. *Billing v. Billing* 232
9. Testator gave one third of his residue to his niece, which he desired might be settled by his executors on her, for her separate use, for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew. The Court directed the third to be settled in trust for the niece, for her separate use, for life, and, after her death, in trust for her issue then living, and if there should be no such issue, then in trust for the nephew. *Stonor Curcen* 264
10. Testator having estates in Jamaica and England; by his will, directed his English estates to be sold, and 10,000*l.* to be paid, out of the produce, to the plaintiff. He afterwards sold his English estates, and by an unattested codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the plaintiff, and charged all his estates with the payment thereof. He then made another codicil, which was duly attested,

- and in which he referred to his will, and ratified and confirmed all the provisions and bequests which he had thereby made in the plaintiff's favour. Held that the Jamaica estates were liable to the payment of the 10,000*l*. *Gordon v. Lord Ray* 274
11. Testator bequeathed certain monies, &c. to his wife, in trust for her so long as she remained a widow; and on her marrying again, he bequeathed to her one third of all his property not otherwise disposed of, and the remaining two thirds to his nieces. The widow died unmarried. Held that she was entitled to the money in the stocks for her widowhood only, and that on her dying unmarried the residue became undisposed of. *Pile v. Salter* 411
12. Testator gave 6,000*l*. to each of his daughters, then or thereafter born, payable at 21 or marriage, and directed that the portions of such of them as should die before they were payable, should sink into the residue: and, after devising his real estates to his sons and daughters in strict settlement, he bequeathed the residue of his personal estate to trustees, in trust for such of his children as should first be entitled to his real estates. By a codicil, the testator gave, to each of his daughters living at his decease, 1,000*l*. in addition to the 6,000*l*. mentioned in his will, for the same uses, &c. as were mentioned therein. By a second codicil which commenced and concluded in the same words as the first but did not refer to it, the testator gave to each of his two daughters 2,000*l*. in addition to the 6,000*l*. mentioned in his will, and directed that the portions of his children who should die before they became payable should not fall into the residue, but go to his heir. The testator left two daughters. Held that the legacies given to them by the codicils were cumulative. *Watson v. Reed* 431
13. Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, and to raise and pay, to each of his children, 2,000*l*. on their attaining 21, and to accumulate the surplus income of the trust property, during the life of his wife, and, after her death, to sell the property, and divide the proceeds amongst his children on their attaining 21; and in case all his children should die in the lifetime of his wife, or under 21 and without leaving issue, then, after his wife's death, to sell the trust property and divide the proceeds amongst certain other persons. Held that *or*, ought to be read as *and*, and that the children, having attained 21, were absolutely entitled to the property, though their mother was living. *Miles v. Dyer* 435
14. Testator gave 200*l*. to each of his nieces and their children, to be paid, within nine months after the death of his wife, amongst his nieces and their children, as his wife should, by will, appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to the nieces. They afterwards died without having had any children. Held that the payment was properly made. *Pyne v. Franklin* 458
15. Testator devised all his goods, chattels, estate and effects of what nature soever and wheresoever not thereby otherwise disposed of, to his executors, upon the trusts after mentioned. He then willed that all his debts, &c. should be paid, and what remained of his personal effects should be appropriated for the benefit of his family, as his executors should think proper; next he willed that his family should be placed in his farm, subject to the direction and control of his executors, and that, when his youngest son attained 21, it should be sold, and the produce divided amongst his wife and children. Held that the legal fee in the farm passed to the executors, and that they were entitled to sell it for the payment of the testator's debts. *King v. Shrives* 461
16. A testator gave all his property to trustees, and declared that he had made no provision for his grand-daughter K. H. because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children for their lives, with remainders to their children. He then made a codicil as follows, "My dear daughters, is that you do give my dear grand-daughter, K. H., 1,000*l*., and that you will be kind to E. S. And it is my desire that you do give her some part of my table-linen and sheeting. This is my last wish." By a subsequent codicil, he made some alteration in the bequest made, by his will, in favour of one of his daughters, and, subject thereto, confirmed his will. Held that the second codicil, confirmed the first, as being part of the will, and that the concluding sentence of the first codicil, was sufficient to create a bequest of 1,000*l*., to K. H., and that as the articles specially given by it to E. S., passed, by the will, to the trustees, and not to the daughters, so the 1,000*l*. was to be paid, not by the daughters out of their life interests, but by the trustees, out of the testator's general personal estate. *Hinxman v. Poynder* 546
17. Testator gave 5,000*l*. to trustees, in trust for his daughter E. for life, and, after her death, in trust to apply the in-

terest for the maintenance of all her children as should be living at her death, during their minorities, and on their attaining 21, in trust to transfer the same equally between them; but, if E. should die without leaving any such child, or leaving such they should all die under 21, then to transfer the same unto such children of F. as should be living at E.'s death without issue. One of E.'s children attained 21, but died in E.'s lifetime. Held that that child did not take a vested interest. *Tucker v. Harris* 538
See CHARITY.—CONSTRUCTION.—CROSS

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REPORTS
OF
CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

BY NICHOLAS SIMONS,
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

VOL. VI.
CONTAINING CASES IN 1831, 1832, AND 1833,
WITH A FEW OF LATER DATE.

NEW-YORK:
BANKS, GOULD & CO., LAW BOOKSELLERS.
ALBANY:
GOULD, BANKS AND GOULD, 475, BROADWAY.
1851.

LORD BROUGHAM and VAUX		Lord Chancellor.
SIR J. LEACH	. . .	Master of the Rolls.
SIR W. HORNE	}	Attorneys-General.
SIR J. CAMPBELL		
SIR J. CAMPBELL	}	Solicitors-General.
SIR C. C. PEPYS,		

A

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CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

SCHLOSS v. STIEBEL.

1833: 29th January.—*Legacy.—Construction.*

A Testator domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged and betrothed to a Lady; and by a Codicil, to his Will, after mentioning her by name, and alluding to his intended Marriage with her, he gave 3,000*l.* to his Wife. During the Engagement, but before the Marriage, the Testator died. Held that the Lady was entitled to the Legacy.

BERNHARD STIEBEL, a naturalized British Subject domiciled at *Kingston* in *Jamaica*, by his Will dated the 8th of May 1830, gave to Trustees, two Sums of 4,000*l.* each, upon certain Trusts for the benefit of his Natural Sons, *Bernhard Stiebel* and *Phillip James Stiebel*, and, after giving several other Legacies, he bequeathed the Residue of his Personal Estate to the same Trustees, upon certain Trusts for the benefit of his Natural Sons before-mentioned, and appointed the Trustees Executors of his Will.

The Testator, shortly after the date of his Will, left *Jamaica*, and went on a visit to his Relations, who resided at *Frankfort* in *Germany*, where he remained until his decease; and, during his residence there, he became much attached to the Plaintiff, and a Treaty of Marriage was set on foot between them, and they, thereupon, were engaged and betrothed to each other as intended Husband and Wife; and, during such engagement and betrothal, the Testator made a Codicil to his Will, dated the 19th [*2] of August 1830, and which was as follows:

“ I, the undersigned *Bernhard Stiebel*, lately residing in *Kingston, Jamaica*, and now residing with my Family, being in best health, and sound of mind, wishing to alter a Will I made in the said Island, of which one is in the possession of my beloved Brothers, *Sygmund Stiebel*, and, in *London*, *Samuel Stiebel*, two of my Executors, Trustees of my Children I may have

1833.—*Schloss v. Stiebel.*

with her, Miss *Adelaide Schloss*, my Niece,* which I may marry in a few days, jointly with *Nathan Mayer Rothschild*, and *Solomon Cohen*, Esquires, of *London*, as Co-Executors and Co-Trustees in case of need, namely, instead of the 5,000*l.*, I to my Sons *Bernhard Stiebel* and *Philip James Stiebel*, they are only to have 2,000*l.* sterling on my death when they are of age, provided my other Children which I shall have with Miss *Adelaide Schloss*, Daughter of my beloved Sister, should have not the same, then the other must give it to divide it alike. In case of my death, I leave to my Wife 3,000*l.* sterling; the rest of my Fortune Personal and Furniture, to my Wife, to my Children only begot by her, as the others before-mentioned are provided for. I name, likewise, my four Executors and Trustees as Residuary Legatees for the aforesaid *Adelaide Schloss*, my Wife, what may accrue, since the 1st of February 1830, in our business of *Samuel Stiebel* and Brothers, in *Kingston, Jamaica*, and *Samuel Stiebel* in *London*; the

[*3] Legacies to my beloved Family remain as per my Testament: Made this year, *Frankfort*, the 19th of August 1830, *Bernhard Stiebel.*"

Upon this Codicil was written an Indorsement, in the handwriting of the Testator, as follows: "A Codicil to my Will made in *Kingston, Jamaica*, by *Bernhard Stiebel*, *Frankfort*, 19th August 1830; to be opened after my death.—*B. S.*"

On the 6th of October 1830, the Testator made another Codicil as follows: "*Frankfort*, October 6th, 1830. I, the undersigned *Bernhard Stiebel*, on my leaving *Jamaica*, had two Sons, *Bernhard Stiebel* and *James Stiebel*; left them a great Fortune to the prejudice of my Family, not being married to their Mother, which is not even named for not disgracing them. I annul that Amount of the former named, my Son *Bernhard*, and the other *James*; I make it only 1,000*l.* sterling to each of them: my Trustees in my former Will and Testament will strictly watch this my injunctions, this, if my death should, if God forbid, before they are of age, this 2,000*l.* are to be put out on Interest for their Education; should that not reach 2,000*l.* more, the latter to return to my Wife and Children, and to pay the Legacies left to my honoured Family in my last Testament. May God the Almighty bless us, that, for a hundred years, we may not have to open our Wills and Testaments wishes your affectionate and loving Brother, *Bernhard Stiebel.*"

Upon this Codicil, was written an Indorsement in the handwriting of the Testator, in the following words: "Duplicate original in our dear

[*4] Brother's Letter to *Jamaica*, Codicil to my last Will, not to be opened till after my death.—*B. Stiebel.*;"

* It was stated, though there was no evidence of the fact, that the Testator and his intended Wife were Jews, and that, by the Jewish Law, a marriage between an Uncle and Niece was valid.

1833.—Schloss v. Stiebel.

The engagement and betrothal between the Testator and the Plaintiff, continued until the 15th of October 1830, when the Testator died a Bachelor.

The Bill alleged that the Plaintiff was the Person designated, in the Codicils, by the descriptions of the Testator's Wife ; and prayed that she might be declared to be entitled to the Legacy of 3,000*l.*, and also to the Residue of the Testator's Estate.

Mr. *Pepys* and Mr. *Kindersley*, for the Plaintiff, said that though there was, in the Will, a misdescription of the Plaintiff, yet her identity was clear ; and that there was nothing, on the face of the Will, to show that the Bequests to the Plaintiff, were made upon the condition of her becoming the Testator's Wife. *Kennell v. Abbott* (a).

Sir *Edward Sugden* and Sir *George Grey*, for the Defendant, the Next of Kin of the Testator :

The question is whether this Testator intended to make the Plaintiff his Legatee, though no Marriage should be solemnized between them, and to provide for Children who never could be born. The Legacy is not given to the Plaintiff, by name, but only in the character of the Testator's Wife. If she had refused to marry the Testator, and had married some one else, could she then have claimed the Legacy ? Our *construction [*5] gives, to every word in the Will, its natural import ; whereas, to give effect to the Plaintiff's Claim, you are forced to conjecture that the Testator meant to provide for her, although he did not marry her. If there was no Wife, there was no Gift.

Mr. *Koe*, for the Defendants, the Executors.

The VICE-CHANCELLOR :

The Legacy given to the Plaintiff, is not given on condition of the Testator marrying her. The Testator made his Will under the impression that his intended Marriage with the Plaintiff, would take effect ; and he has described the Plaintiff with reference to his intention of marrying her. If the Legacy were not to take effect, things would not be placed in the same situation as they were in before, as the Legacies to the Natural Sons would still be reduced.

Declare that the Plaintiff is entitled to the Legacy of 3,000*l.*, absolutely, and to an Interest for Life in the General Residue.

(a) 4 Ves. 802.

1833.—Kennedy v. Green.

[*6]

*KENNEDY v. GREEN.

1833: 2d February.—*Purchaser.—Production of Documents.—Fraud.*

A Deed in the custody of a Purchaser for valuable Consideration, which the Bill impeached for Fraud, ordered under special circumstances, to be produced.

THE Plaintiff Mrs. *Kennedy* had employed *Bostock*, her Solicitor, to lay out a Sum of Money for her on Mortgage, and, accordingly, he invested part of that Sum on Mortgage of some Leasehold Houses. The Mortgagor, afterwards, became Bankrupt, and *Bostock* purchased the Equity of Redemption of the Houses, from his Assignees. Afterwards, *Bostock* called upon the Plaintiff and produced a Document, which he represented it was necessary for her to execute, in order to enable her to receive the Interest of the Mortgage-money more punctually in future; and the Plaintiff, on the faith of that representation, signed the Document. *Bostock* afterwards became Bankrupt, and the payment of the Interest having ceased, the Plaintiff made inquiries as to the cause, when she discovered that the Document which she had signed, was an Assignment of the Mortgage to *Bostock*, and that he had mortgaged the Houses to the Defendant *Kirby*.

The Bill was filed to set aside the Assignment, for Fraud. It alleged that the Plaintiff executed the Deed under the impression that it was a Power of Attorney; that, when she signed the Receipt on the back of the Deed, the Deed was folded down, so that she could not see what she was signing; and that the Fraud practised on the Plaintiff in procuring her Signature to the Receipt, would appear on inspection of the Deed. *Kirby*, in his Answer, said that he had advanced 2,000*l.*, to *Bostock*, on the security of the Houses, and denied, generally, all notice or suspicion of any Fraud having been practised on the Plaintiff, in procuring the Assignment from her.

The Plaintiff now moved for a production of the Assignment.

Mr. *Pepys* and Mr. *Gridlestone*, in support of the Motion, cited *Balch v. Symes* (a): *The Princess of Wales v. The Earl of Liverpool* (b); and *Beckford v. Wildman* (c).

Mr. *Knight* and Mr. *Hughes*, for the Defendant *Kirby*, relied on the Defendant being a purchaser for Valuable Consideration without notice, and cited *Tyler v. Drayton* (d); *Rowe v. Teed* (e); and *Codrington v. Codrington* (f).

The VICE-CHANCELLOR:

(a) 1 Turn. & Russ. 88.

(d) 2 Sim. & Sta. 309.

(b) 3 Swanst. 567.

(e) 15 Ves. 372.

(c) 16 Ves. 438.

(f) *Ante*, Vol. III. p. 519.

1833.—Fencott v. Clarke.

This is a Motion for the Production of a Deed which constitutes the Defendant's Title, and which the Plaintiff seeks to impeach for Fraud. The Plaintiff alleges that certain suspicious circumstances appear on the back of the Deed, which tended to show that the execution of it was obtained from her by Fraud; and, though the Defendant says that he is a Purchaser for Valuable Consideration without notice of the Fraud, he does not deny that he had notice of those circumstances. Now a Purchaser for Valuable Consideration, is bound to answer all the Allegations that tend to show that he had notice of the Fraud; and the Defendant not having [*8] done so, I think that he ought to produce the Deed.

Motion granted (g).

FENCOTT v. CLARKE.

1833: 2d & 5th Feb. & 21st March.—*Production of Document.*

A voluntary Deed belonging to the Defendant, which the Bill impeached for Fraud, and which was in the custody of the Defendant's Solicitor, who claimed a Lien on it, ordered to be produced for the Plaintiff's inspection, after it had been proved by the Defendant, and Publication had passed.

THE Bill was filed to set aside a voluntary Deed, made in favour of the Defendant *Clark*, on the ground that it had been obtained from a Person of unsound mind. The Deed was in the hands of the Defendant *Devereux*, *Clark's* Solicitor, who claimed a Lien upon it, and had been produced and proved in the Cause on behalf of *Clarke*. The Plaintiff, after Publication had passed, moved that *Devereux* might be ordered to produce the Deed.

Mr. *Rudall*, in support of the Motion, cited *Beckford v. Wildman* (a), and *Balch v. Symes* (b).

Mr. *Stinton*, contra, cited *Davers v. Davers* (c); *Wright v. Mayer* (d); *Forester v. Helm* (e); *Hodgson v. Earl of Warrington* (f).

*The Vice-Chancellor, at first, hesitated about granting the Motion, as Publication had passed; but, after having read the Bill and Answer, His Honor said that he saw no reason why he should not order the Deed to be produced in the usual way. [*9]

Motion granted.

(g) The Cause was afterwards heard before Sir J. Leach, M. R. His Honor decreed in the Plaintiff's favor, on the ground of the suspicious circumstances appearing on back of the Deed and Lord Brougham, C. affirmed the Decree.

(a) 16 Ves. 275.

(b) 1 Turn. & Russ. 87.

(c) 2 P. W. 210.

(d) 6 Ves. 231.

(e) Madd. 558.

(f) 3 P. W. 24.

 1833.—Smith v. Hammond.

PRYTHARCH v. HAVARD.

 1833 : 8th February.—*Specific Performance.—Infant.—Costs.*

After Decree in a Suit for Specific Performance, against the Infant Heir of the Vendor, a Petition must be presented under 11 Geo. 4, and 1 Will. 4, c. 60, for an Order that the Infant may convey to the Purchaser. The Costs of the Suit were ordered to be paid out of the Purchase money.

THIS was a Suit, instituted by a Purchaser, for a Specific Performance.

The Vendor, after entering into the Contract, had died leaving an Infant Heir.

The *Vice-Chancellor* decreed a Specific Performance, and said that a Petition must be presented, under 11 Geo. 4, and 1 Will. 4, c. 60, for an Order that the Infant Heir might convey to the Purchaser : and His *Honor* ordered the Costs of the Suit to be paid out of the Purchase money, and the Residue to be paid to the Executors of the Vendor (a).

Mr. *Jeremy*, for the Plaintiff.

Mr. *Evans*, for the Defendants.

 [*10]

*SMITH v. HAMMOND.

 1833 : 8th February.—*Interpleader.—Principal and Agent.*

Where a Principal has created a Lien in favour of another Person, on Funds in the hands of his Agent, the Agent may file a Bill of Interpleader against his Principal and the other Claimant.

IN May 1830, a Brig of which the Defendant *J. Hammond*, who was an American Citizen, was the sole Owner, was wrongfully captured by a Squadron belonging to the *Portuguese* Government ; in consequence of which a Claim to Compensation was made on that Government, on his behalf. In May 1831, he executed a Power of Attorney to the Plaintiffs, *Duff & Co.*, who were Merchants in *Lisbon*, authorising them to receive for him, as his Agents, any Monies that might become payable in respect of his Claim. In November 1831 the *Portuguese* Government admitted the Claim, and the 1st of January 1832 was fixed for the payment of the first Instalment on account of it ; but *Hammond*, as he alleged, did not know that his Claim had been admitted until March 1832. In December 1831, *Hammond*, in consideration (as he alleged) of the Defendant *C. Allen*, having promised to

(a) See *Fellows v. Till*, ante. Vol. p. 312.

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use his influence with the *American* and *Portuguese* Governments, in procuring the recognition and payment of the Claim, executed an irrevocable Power of Attorney to *Allen*, who resided at *Providence* in *America*, authorizing him to receive the Monies to be recovered from the *Portuguese* Government; and, in January following, he executed an Instrument in the following words: "Know all Men by these presents, that I, *John Hammond*, owner of the Brig *Ann* and Cargo, lately seized and condemned by the *Portuguese* Government, having appointed *C. Allen*, of *Providence*, to be my Agent and Attorney for recovering of my Claims on that Government, do hereby agree to pay to the said *C. Allen* 10 per cent. on all Sums which he may recover, *until the amount recovered shall equal the Sum [*11] of 8,000 dollars, and, upon all Sums over the amount of 8,000 dollars so recovered, I agree to pay him 33 per cent., which Commission he is to retain out of any Sums recovered."

In July 1832, *Hammond* received from *Duff & Co.* a letter dated the 16th of June 1832, stating that they had received, from the *Portuguese* Government, 1,480*l.* in respect of his Claim, and that they would give orders to the other Plaintiffs, *Smith, Woodhouse & Co.*, their Agents in *London*, to honour his Drafts to that amount; and on the 3d of August *Duff & Co.* wrote to *Smith, Woodhouse & Co.* as follows: "We have authorized Captain *John Hammond* to draw on you for 1,480*l.* and have desired him to advise you of his Draft, which you Will please to honour, and debit our Account with the amount." On the 5th of September, *Smith, Woodhouse & Co.* wrote in answer as follows: "We shall follow your instructions and honour Captain *J. Hammond's* Draft on us for 1,480*l.* on your account." On the 17th of August 1832, *Hammond* wrote a letter to *Smith, Woodhouse & Co.*, desiring to be informed whether the 1,480*l.* would carry Interest whilst in their hands, and adding that, if it would, he should wish it to remain there for some time; but, if not, he should draw for it on the receipt of their answer. On the 1st of October, *Smith, Woodhouse & Co.* wrote, in answer, that the 1,480*l.* would remain to the credit of *Duff & Co.*, at Interest at Four per Cent., until they paid *Hammond's* Drafts. On the 30th of the same Month, *Smith, Woodhouse & Co.* received two Letters from *Hammond*, stating that some time ago, he had given a Power of Attorney to *Allen*, but that *Allen* had then no power to act, and *desiring [*12] them not to pay any Money to *Allen* until they heard from him. In November 1832, *Smith Woodhouse & Co.* were served with a Notice, signed by the Solicitors of *Thomas Wilson & Co.*, who were *Allen's* Agents in *London*, stating that, on the 2d of December 1831, *Hammond* had made over his Claim to the proceeds of the Brig, to *Allen*, and requiring them not to pay over the Funds in their hands to any other Persons.

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Under these circumstances, *Smith Woodhouse & Co.*, and *Duff & Co.* filed a Bill against *Hammond* and *Allen*, praying that they might interplead and settle their rights to the 1,480*l.*, and that they might be restrained from commencing any Action against the Plaintiffs to compel payment of that Sum.

Hammond, who had arrived in *England*, appeared to and put in an Answer to the Bill, stating that it was not his intention that the Instruments which he had executed to *Allen*, should authorize *Allen* to receive the Monies that might become payable to him from the *Portuguese* Government, or give *Allen* any interest therein otherwise than as his Agent; and that, on the 5th of October 1832, he wrote a letter to *Allen*, whereby he wholly determined and put an end to *Allen's* powers and authorities under those Instruments, and, for more effectually preventing *Allen* from receiving any Monies by virtue of them, he wrote to *Smith, Woodhouse & Co.* the Letters which were received by them on the 30th of October.

Allen, being in *America*, had not appeared to or answered the Bill when the Motion after-mentioned was made; but one of the Partners ['13] in the firm of *Thomas * Wilson & Co.*, made an Affidavit, stating that he and his Partners had received, from *Allen*, the Instruments which *Hammond* had executed, and had forwarded them to their Agents in *Lisbon*, without keeping any Copies thereof: that the Deponent believed that those Instruments amounted to an Assignment of the Funds to be recovered from the *Portuguese* Government, or, certainly, to an irrevocable authority to receive the same: that the Deponent was led to believe, by the Papers received from *Allen* and forwarded to *Lisbon*, that *Allen* had assisted, through the intervention of the *American* Government, in obtaining the recognition or payment of the Claim; and that, if sufficient time was afforded for *Allen* to put in his Answer, he would show the grounds on which he was entitled to receive the 1,480*l.*: that the Deponent had instructed *Allen's* Solicitors in the Suit, to send out to him the necessary Documents to enable him to swear to his Answer, and to return the same to *England* without delay; and that the Deponent and his Co-partners had written to and informed *Allen* of the Notice given to *Smith Woodhouse & Co.*, and requested him promptly to furnish the means of legally establishing his Claim.

Hammond now moved that the Injunction, which the Plaintiffs had obtained, might be dissolved, and that the 1,480*l.*, which the Plaintiffs had paid into Court, might be paid out to him.

Mr. *Pepys*, for the Plaintiff.

Mr. *Knight* and Mr. *Stephens* for the Defendant *Hammond*, contended that the Plaintiffs were *Hammond's* Agents, and had no right to ['14] file a Bill of *Interpleader in respect of Monies received by them

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in that character : *Nicholson v. Knowles* (a) : that, as the Power of Attorney which had been executed to *Allen*, had been revoked, it was clear that no Claim could be supported by him.

Mr. *G. Richards*, for the Defendant *Allen*, said that it was clear that *Allen* had a Lien on the Fund, which had been created by *Hammond* : that it resembled the Case in which a Tenant is entitled to file a Bill of Interpleader against his Landlord ; and that, at all events, a reasonable time ought to be allowed for *Allen* to put in his Answer.

The VICE-CHANCELLOR :

The Proposition in *Nicholson v. Knowles*, seems to be laid down rather widely : that Case, however, does not apply to the present.

The Instruments which *Hammond* executed to *Allen*, appear to me to amount to an Assignment of the Fund in question, and I think that the Plaintiffs are Stakeholders.

The adverse Claims must be decided upon in some way or the other : and the question is, whether that should be done by referring it to the Master to ascertain whether *Allen* has any and what Claim on the Fund, or by letting *Hammond* bring an Action against the Plaintiffs, and giving *Allen* liberty to defend it.

The Order pronounced was that it should be referred to the Master to ascertain whether *Allen* had any and what Claim on [*15] the Fund ; that he, being in the situation of a Plaintiff and being resident Abroad, should give security for Costs to the amount of 100*l.* ; and that the Plaintiffs' Costs should be paid out of the Fund, without prejudice to the question by whom those Costs should be ultimately paid (b).

FOSTER v EVANS.

1833: 11th February.—Portions.—Satisfaction.

On a Marriage, the Father and Husband of the Lady, gave Bonds for 3,000*l.* each, to be paid to the Trustees upon the Trusts of the Settlement. The Father died, leaving the whole of the Principal and some of the Interest, due on his Bond, and having bequeathed 3,000*l.* to his Executors, upon the same Trusts for the benefit of his Daughter and her Husband and their Issue, as were declared, by the Settlement, of the Trust-moneys therein comprised. Held that the Legacy was not a satisfaction of the Father's Bond.

THOMAS OLDHAM gave to *J. Wilson*, *R. Evans* and *W. Oldham*, his

(a) 5 *Mnd.* 47.

(b) See *Mason v. Hamilton*, ante Vol. V. p. 19, and *Crawshaw v. Thornton*, post.

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Bond for 6,000*l.*, dated the 11th of April 1811, for securing to them the payment of 3,000*l.* on the 11th of April 1819, with lawful Interest in the meantime, to be paid and applied by them according to the Trusts and Directions contained in the Settlement on the Marriage of his Daughter with *John Foster*. By the Settlement, after reciting the intended Marriage and the Bond, and that *Foster* had agreed to secure, to the same Trustees, the like sum of 3,000*l.*, by his Bond, to be paid at the expiration of ten years from the solemnization of the Marriage, but without Interest in the meantime, and to be settled upon the Trusts and for the purposes thereafter expressed, and that he had executed his Bond to the Trustees accordingly; it was declared that the Trustees should invest the said sums of 3,000*l.* and 3,000*l.*, when payable, in the purchase of Government or Real Securities, in Trust, during the joint Lives of Mr. and Mrs. *Foster*, for Mr. *Foster*, and, [*16] after the decease of either of them, *for the Survivor, for life, and, after the decease of the Survivor, in Trust for the Children of the Marriage as therein mentioned; and, if all the Sons of the Marriage should die without Issue before 21, and all the Daughters, before 21 and without having been married, then, in case Mr. *Foster* should die in the lifetime of his Wife, in Trust, as to one Moiety of the Trust Monies, for his Executors, &c., and, as to the other Moiety, in Trust for such Persons, &c., as Mrs. *Foster*, should appoint, and, in default of appointment, in Trust for *Thomas Oldham*, his Executors, &c.; and, in case Mr. *Foster* should survive his Wife, then, as to the whole of the Trust Monies, in Trust for him absolutely.

Thomas Oldham, by his Will, dated the 23d of May 1832, after devising certain Freehold Estates, gave all his other Real Estates, to *R. Evans*, *John Foster* and *E. Hemsley*, in Fee, upon Trust to pay the Rents to Mrs. *Foster*, for her separate use, for life, and, after her decease, to stand seised of the same upon such Trusts, &c. as Mrs. *Foster* should appoint, and, in default of Appointment, in Trust to sell the same, and to invest the Proceeds in Government or Real Securities, and to stand possessed thereof upon the Trusts thereafter declared. The Testator afterwards proceeded thus: "I give and bequeath unto the said *R. Evans*, *John Foster* and *E. Hemsley*, their Executors, Administrators and Assigns, the sum of 3,000*l.*, upon Trust to lay out and invest the same in the manner hereinbefore directed with respect to the Monies to arise from the Sale of the Hereditaments secondly hereinbefore devised, with the same powers of varying Securities; and I direct the said *R. Evans*, *John Foster* and *E. Hemsley*, their Executors, Ad- [*17] ministrators and Assigns, to stand possessed *of the said sum of 3,000*l.*, and the Stocks, Funds and Securities, in or upon which the same shall be laid out or invested, upon the same Trusts for the benefit

 1833. In re Willoughby's Charity.

of my Daughter, *Ann Maria Foster* and *John Foster*, and their Issue, as by the Settlement made previous to, and in contemplation of the Marriage of the said *Ann Maria Foster* with the said *John Foster*, her present Husband, are expressed and declared of the said Trust Monies, Stocks, Funds, and Securities comprised in such Settlement." And the Testator appointed *R. Evans*, *J. Foster* and *E. Hemsley*, Executors of his Will.

The Testator died on the 1st of September 1832, leaving the whole of the Principal and some of the Interest due on his Bond, but which his Executors paid after his death.

The Bill was filed by Mr. and Mrs. *Foster* and their Children, against *Evans* and *Hemsley*, stating that the Executors had refused to invest the 3,000*l.* as directed by the Will, on the ground that that Legacy was given in satisfaction of the Bond, and praying that the Plaintiffs might be declared entitled to the benefit of that Legacy, in addition to the 3,000*l.* secured by the Bond, and that it might be invested, out of the Testator's Assets, upon the Trusts of the Settlement.

The Defendants put in a general Demurrer.

Sir *E. Sugden* and Sir *George Grey* in support of the Demurrer :

The general rule is that, if a Child is already provided with a Portion, and the Father, by his Will, gives a like Sum to the Child, the latter is in lieu of the "former. The question then is, whether the words of [*18] reference, in this Will, take the Case out of the general rule. There are two Sums of 3,000*l.* comprised in the Settlement, one of which came from the Father, and the other from the Husband, and the words of reference may be considered as applying to that Sum which did not come from the Father.

Mr. *Knight* and Mr. *Chandless* appeared in support of the Bill. But

The *Vice-Chancellor*, without hearing them, said that it appeared, on the face of the Will, that the Testator did not intend the Legacy to be a satisfaction of the Bond. For, as he referred to the Settlement, it was clear that he had it in his recollection when he made his Will ; and, consequently, if he had intended the Bequest to be a Satisfaction of what was due on his Bond, he would have so declared.

Demurrer overruled.

IN RE WILLOUGHBY'S CHARITY.

1833 : 12th February.—*New Orders*.—*Practice*.—*Service*.

The Respondents to a Charity Petition, are Parties to it, and, therefore, they are not within the 44th Order.

THIS was a Charity Petition, to which the Trustees of the Charity were Respondents, and they had been ordered to pay the Costs of the Petition.

1833.—*Colleton v. Garth.*

Upon an Application made, by Mr. *Treslove*, relative to the service of the Order,

[*19] *The Vice-Chancellor* ruled that the Trustees, being Respondents, were Parties to the Petition, and, therefore, that the Case was not within the 44th of the New Orders of 1828.

COLLETON v. GARTH.

1833: 16th February.—*Construction.—Widow.—Legacy.—Ademption.*

A Rent-charge expressed to be for a Jointure, and in lieu of Dower and Thirds at Common Law, does not bar the Jointress of her Distributive Share in her Husband's undisposed of Personal Estate.

The Testator gave, to his Wife, his House in *B.* and the Furniture in the said House. The Lease of the House expired in the Testator's life-time, and he took another House, and removed his Furniture to it. Held that the Legacy was adeemed.

THE Testator in this Cause bequeathed, to his Wife, the Lease of his House in *Barber-street*, and the House-hold Furniture, Plate, Pictures and certain other Articles therein. The Lease having expired in the Testator's Life-time, part of the Furniture was sold, and the Remainder, together with the Plate, Pictures and other Articles, was removed to a House which the Testator took in *Edward Street*.

One of the Questions in the Cause was whether the Testator's Widow was entitled to the remainder of the Furniture, and to the other Articles.

Another Question was whether the Widow was excluded from her Distributive Share of the undisposed of residue of the Testator's Personal Estate, in consequence of the Testator having, on his Marriage, settled on her a Rent-charge for her Jointure, and in lieu of Dower and Thirds at Common Law.

The Attorney-General, Mr. *Pepys*, Mr. *James* and Mr. *Giddestone*, Junior for the Testator's next of Kin, contended, first, that the Will, in [*20] this case, must be considered to speak as at the Testator's death, and that all the Articles having been removed, and part of the Furniture having been sold, by the Testator, the Bequest had failed. *Green v. Symonds* (a); *Heseltine v. Heseltine* (b). Secondly, that the Jointure, being expressed to be in lieu of Thirds at Common Law, the Widow was barred of her Distributive Share of the residue. *Walker v. Walker* (c); *Davila v. Davila* (d); *Glover v. Bates* (e); *Druce v. Denison* (f); *Garthshore v. Chalie* (g).

(a) Bro. C. C. 128, note.

(b) 3 Madd. 276.

(c) 1 Vez. 54.

(d) 2 Vern. 724.

(e) 1 Atk. 439.

(f) 6 Ves. 385.

(g) 10 Ves. 1.

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Sir *Edward Sugden* and Mr. *Garratt*, for the Widow, said that, when the Lease of the House expired, the Furniture, &c. were removed, from necessity, and not with the intention of adeeming the Legacy; that it was like the Case mentioned, by Lord *Hardwick* in *Green v. Symonds*, of the removal of Goods to save them from Fire, or the Case mentioned, in *Swinburn*, of a Testator receiving a Sum of Money which had been secured by Mortgage, and laying it by for the Legatee; that, in *Heseltine v. Heseltine*, the Gift was, specifically, of the Property that should be in the Testator's House at the Time of his Death; that, in *Green v. Symonds* the Testator was dealing with Personal Estate, generally; but here there was no general Gift of Personal Estate, nor did the Testator speak of Furniture, &c. in his House at the time of his death, but he spoke of the Furniture, &c. as being in the House, merely for the purpose of identifying it. *Land v. Devagnes* (h).

*Mr. *Knight* and Mr. *Gridlestone*, senior, appeared for other [*21] Parties.

The VICE-CHANCELLOR:

It is clear that the Rent-charge was intended to be in lieu only of any Claim which the Wife might have upon her Husband's Lands; and that the Testator made the Bequest of the Furniture, &c. with reference to giving the Lease, and that he had in contemplation an enjoyment of the House with the Furniture, &c.; and, consequently, the Bequest has totally failed by the change of Circumstances.

Declare that the Widow is not barred of her Distributive Share of the undisposed of residue of the Testator's Personal Estate, and that she is not entitled to any part of the Furniture, &c.

TANNER v. RADFORD.

1833: 19th February.—*Tenant in Tail—Recovery.—Resulting Use.*

If a Tenant in Tail suffers a Recovery. and declares Uses which are void, he does not take back an Estate Tail, but an Estate in Fee.

JOHN RADFORD, being seised in Fee of the Advowson of the Rectory of *Lapford*, in the County of *Devon*, on his Marriage in 1763, settled it on himself for life, with Remainder to the use of all and every, or such one or more of the Sons of the Marriage, for such Estate, not exceeding an Estate in Tail Male, and in such Shares, &c. as *Radford* and his intended Wife

(h) 4 Bro. C. C. 537.

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should, during their joint lives, appoint ; and, in default thereof, and in case *Radford* should survive his intended Wife, to the use of all and every, or such one or more of the Sons of the Marriage, for such Estate not exceeding an Estate in Tail Male, and in such Shares and 'Portions, and with or without power of Revocation, as *Radford* should after his Wife's death, by Deed, or by his Will, to be executed and attested as therein mentioned, appoint ; and, in default thereof, to the use of the first and other Sons of the Marriages successively in Tail Male, with Remainder to the use of the Daughters of the Marriage, as Tenants in common in Tail, with Cross Remainders in Tail, with Remainder to the use of *Radford*, his Heirs and Assigns for ever.

There was Issue of the Marriage two Sons, *John*, who died an Infant in the lifetime of his Father and Mother, and *William*, who was the Testator in the Cause, and two Daughters. Mrs. *Radford* died in the year 1770, leaving her Husband surviving.

By Indentures of Lease and Release, dated the 7th and 8th of November 1790, and made between *John Radford*, and *William Radford* therein described as Son and Heir Apparent of *John Radford*, of the first part, *Nath. Batten* of the second part, and *Arundel Radford*, Clerk, of the third part : It was witnessed that, for barring and docking all Estates Tail and Remainders thereupon expectant of and in the Advowson and other Hereditaments thereafter mentioned, and for assuring the same to the Uses aftermentioned, *John Radford* and *Wm. Radford* conveyed and appointed unto and to the use of *Batten*, in Fee, (together with other Hereditaments) the Advowson of *Lapford*, then in possession of *John Radford* as the then Incumbent thereof, to the intent that he might become Tenant of the Freehold, in order to the suffering a common Recovery, the Uses whereof were thereby declared to be, so far as concerned the Advowson, upon

[*23] Trust *that *Arundel Radford* and his Heirs should, at all times thereafter, when and so often as the Rectory of *Lapford* should become vacant by the Death, [Resignation, or otherwise, of the then present or any future Incumbent, nominating and present *Wm. Radford*, if he should be then in Priest's Orders, to the Rectory aforesaid, or, if he should be then dead, then upon Trust to present the first and other Sons, or Issue Male of the Body of *Wm. Radford*, as they and every of them respectively should be in seniority of age and priority of birth, and when respectively legally and duly qualified to be nominated and presented thereto, or, in case such eldest or other Son or Issue Male of *Wm. Radford* should, by reason of nonage or otherwise, be incapacitated of being presented to the Rectory, then *Arundel Radford*, or his Heirs, should, in the meantime and before such incapacity should be removed, present such other of the Sons or Issue

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Male of *John Radford* that should be then living and duly qualified to fill any such Vacancy so happening, as *Wm. Radford*, by any Deed or Instrument in Writing, or by his last Will and Testament in Writing, under his Hand and Seal, duly executed in the presence of and attested by three or more credible Witnesses, should direct and appoint, and, for want of such appointment, then upon Trust that *Arundel Radford* and his Heirs should present to the Rectory such other of the Sons or Issue Male of *John Radford*, as the eldest Son of *Wm. Radford* who should live to survive him, should appoint, during all such time and no longer than such eldest or other Son or Issue Male of *Wm. Radford* should, by nonage or otherwise, be incapable of being presented thereto, *Arundel Radford* or his Heirs taking a Bond in a sufficient Penalty, or other Legal Security of such Son or Issue Male of *John Radford* as should be presented thereto, to resign the same to a Son or Issue Male of *Wm. Radford*, as soon as such Son or Issue Male of *Wm. Radford* should be capable of holding the same Rectory, and so, from time to time, as long as any Issue Male descending from *Wm. Radford* should be living and capable of holding the Rectory, and, for want of Issue Male, descendants of *Wm. Radford*, or there being such, and all of them should die and become totally extinct, in Trust to convey and assure the Advowson unto and to the Use of the right Heirs and Assigns of *John Radford* for ever, and for no other use, intent, or purpose whatsoever. [*24]

The Recovery was duly suffered in Michaelmas Term, in the 31st year of Geo 3.

John Radford, by his Will dated the 20th of December 1792, after reciting that he, or *Arundel Radford* in Trust for him and his Heirs, was seised of the Reversion of the Advowson of *Lapford*, expectant on the death of his Son *William* without leaving Issue Male of his body, devised, directed and appointed that *Arundel Radford* and his Heirs, should stand seised of the Reversion, on such contingency happening, to the use of certain Trustees therein named, for the Term of 400 years, and, after the expiration thereof, and, in the meantime, subject thereto, to the use of the Testator's eldest Son, *James Radford*, by his second Wife, for life, with Remainders to his first and other Sons in Tail Male, with Remainders to the Testator's other Sons by his then Wife successively for Life, with Remainders to their Sons in Tail Male: and he declared the Trust of the [*25] Term to be for raising 1,000*l.* for his younger Sons by his then Wife.

William Radford survived his Father *John Radford*, and, by his Will dated the 24th of April 1821, directed that, if his Son *John Arundel Radford* should obtain Holy Orders and become a Priest, then he should take

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the Rectory of *Lapford* to him and his Heirs for ever; but, if he should not obtain Holy Orders, then the Testator gave the Rectory to his Son *Charles* and his' Heirs.

John Arundel Radford took Orders and was instituted to the Rectory.

The Bill was filed by Creditors of *William Radford*, against his Widow and Children: and, by the Decree made on the hearing of the Cause, the *Master* was ordered to inquire and state what Real Estates the Testator, *William Radford*, died seised and possessed of.

The *Master* reported that the Defendant, *John A. Radford*, had submitted before him, that the Testator, *William Radford*, was Tenant for his own life of the Advowson of *Lapford*, and that such Estate for Life determined, therefore, with the Testator's life; and that the Advowson, although specifically devised by the Testator's Will, did not pass by such devise, but that, immediately upon the decease of the Testator, the Defendant *John A. Radford* became seised of it as Tenant in Tail: but the *Master* found that the Testator, *Wm. Radford*, died seised in Fee of the Advowson, discharged of the Land Tax which had been redeemed by him.

[*26] *J. A. Radford* excepted to the Report.

It having been agreed that a Case should not be stated for the opinion of a Court of Law, but that the question should be decided by the *Vice-Chancellor*,

Sir *E. Sugden* and Mr. *Beames*, in support of the Exception, said that, if any of the Limitations in the Recovery Deed of 1790, were too remote, the Court was at liberty to reject them, and to hold that *William Radford* took an Estate Tail, thereby sacrificing the particular Intent to the general intent.

But His *Honor* having said that it was quite impossible to support any of the Trusts, except the first (a), *and the Counsel hav- [*27] ing so admitted, they then contended that, as the Limitations

(a) The following opinions were given by the Counsel who were consulted by the Plaintiffs.

"*John Radford*, by his Will of the 20th December 1792, after having vested the Legal Fee of the Advowson in the Trustee, attempts to entail, not the Advowson itself or the right of presenting, but the right of being presented. The first Trust declared gives *Wm. Radford* the right of being nominated to the Living, and is valid. The subsequent Trusts were intended to fix the Persons who should be nominated, successively, to the Living, after the death of *Wm. Radford*, and appear to me to be all of them void. The Trust, 'for the First and other Sons or Issue Male of the Body of *Wm. Radford*' is void, First, because, in words, it gives, and was intended to give to all the Individuals included in an indefinite Line of Issue, the right of being presented, successively, to this Rectory. Secondly, because it is a Trust to take effect at a time which may exceed Lives in being and 21 Years afterwards; for it is a Trust in favour of a class which includes Persons unborn, and those unborn Persons could not possibly be qualified to be presented within 21 Years from their Birth; the Canons of the Church not permitting any one to be admitted into Deacon's Orders, before the age of 23, or

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declared by the Recovery Deed, had failed, the prior Limitations must be held to be restored, as it must be presumed that the Parties to the Recovery, did not intend to defeat the old Settlement, except for the purpose of giving effect to the new one: that the ultimate Limitation in the Deed of 1790 being, "Unto and to the use of the right Heirs and Assigns of *John Radford* for ever, and for no other use, intent or purpose whatsoever," it was impossible to imply, against that declaration, any Use or Estate that would deprive *J. Radford* of his Reversion in Fee: that, in all the old Cases, it was laid down that, if a man suffers a Recovery or levies a Fine and limits no Use, it shall enure to the old or former Uses (b); and although, in

to be ordained Priest, before 24. This Trust, therefore, falls within the principle of *Pector v. The Bishop of Bath and Wells*, 2 H. Blacks. 358. The next two Trusts (the one giving *William Radford* a Power of appointing, and the other providing for a default of Appointment) are made contingent on an event, which, I apprehend, did not occur, and, therefore, they do not come into question. But, even if these events had happened, still these Trusts, for reasons similar to those above stated, would be void. The latter of them is also vitiated by the Clause for taking a Bond of Resignation, which, according to the judgment pronounced by the House of Lords in *Fletcher v. Lord Sandes*, would be simoniacal and void. There being no valid Gift to the Issue Male of *William Radford*, the ultimate Limitation over upon failure of his Issue Male, is void also, as being too remote. All these Trusts being void, it follows that *William Radford* took no Estate in the Rectory and Advowson under the Uses and Trusts of the Deed of November 1790, except the personal right of being himself nominated to the Living, whenever it should become vacant, and, subject to that right, the equitable Interest in the Advowson (*John Radford* having, as I suppose, been at the time of the Recovery, Tenant for Life, Remainder to *William* in Tail,) resulted to *John Radford* for Life, Remainder to *William* in Fee."

Another Counsel whose opinion was taken for the Plaintiffs, expressed himself as follows, "In my opinion this Advowson belonged to *William Radford*, by resulting Trust consequential on his Ownership under the Estate Tail which existed prior to his Recovery. No Estate Tail was created by the Recovery Deed. The Trusts do not correspond with an Estate Tail, even if the Court could execute them *Cypres*. In my opinion the Limitation over to the right Heirs of *John Radford*, was, in its inception, void."

One of the Counsel consulted for the Defendants, said he apprehended that the Trusts declared by the Recovery Deed, were void, and, if so that the Fee resulted to *William Radford* in Equity. But, in this particular Case, he was inclined to think that the Use would result, in Equity, according to the former Estates; and, if so, that *John Arundel Radford* was Tenant in Tail.

Another of the Counsel consulted for the same Parties, was of opinion that, subject to the Trust to present *William Radford* (which alone was valid) the beneficial Interest in the Advowson, resulted to *J. Radford*, for Life, Remainder to *William Radford*, for a Base Fee, Reversion to *William Radford* in Fee.

(b) 2 Roll's Ab. 789. *Bury v. Taylor*, Godb. 179. *Walker v. Snouce*, Palm. 359. *Argol v. Cheney*, Latch 82. *Armstrong v. Wholesay*, 2 Wils. 19. Gilb. Uses, Sugden's edit. 110. 119. See also 1 Cruise's Dig. 451, 452, 453. It was said, by Sir E. Sugden, in the course of the argument, that the Case of *Nightingale v. Earl Ferrers*, P. W. 206, was not an authority for the proposition laid down by Mr. Cruise, "that, where a Tenant in Tail suffers a Common Recovery, without any Declaration of Uses, the resulting Use is to him in Fee Simple," for the only question in that case, was whether the Uses were well raised by the marriage Articles; and it appeared that the Remainder-man had given a Sum of Money to the Earl and Countess of Northampton, to join in a Fine and Recovery to re-settle the Estate.

1833.—*Angell v. Westcombe.*

[*29] some *modern Cases, it had been held that where a Father, Tenant for Life, and his Son, Tenant in Tail, suffer a Recovery and declare no Uses, the Father takes back an Estate for Life, and the Son an Estate in Fee, those Cases had no bearing upon the present, where the Uses declared were at variance with the Uses implied, and it was not the intention of the Parties to give, to the Son, an Estate in Fee; but, the Uses declared being void, the Recovery must be held to enure to the Uses of the former Settlement; and, consequently, the Exception must be allowed.

Mr. *Knight* and Mr. *James Russell* appeared for the Plaintiffs, in support of the Report.

The VICE CHANCELLOR:

The meaning of the expression, found in the old Cases, that, where a Recovery is suffered without any Use being limited, it enures to the old Use is, I conceive, that the Use results to the former Owner; and, in that sense, it is the old Use (c).

Where the Parties to a Recovery declare Uses which are void, [*30] they have, in Law, done nothing at all. The *effect of a Recovery suffered by a Tenant in Tail, without any declaration of Use, is to enlarge the Estate Tail into a Fee; and, if Uses or Trusts are declared which cannot take effect, the effect is, merely, to leave the Fee in the Tenant in Tail.

In my opinion the point is clear; and the Exception must be overruled.

ANGELL v. WESTCOMBE.

1833: 20th February.—*Demurrer.*—*Bill of Discovery.*—*Pleading.*

A Bill praying Discovery, and concluding with the Prayer for General Relief, is a Bill for Relief. But if words adapted to a Bill for Relief, are used in the Prayer of Process only, it is a Bill of Discovery.

UPON the argument of a Demurrer, one question was, whether the usual Prayer for General Relief, if found in a Bill which, in other respects, was a Bill of Discovery only, did not, of itself, make it a Bill for Relief.

(c) A Recovery suffered of an Estate in Fee, does not alter the descent. *Allot v. Burton* 1 Mod. 181. And, if a Tenant in Tail by Descent *ex parte Materna*, suffers a Recovery which enures to the use of himself in Fee, the course of Descent is not altered. See *Martin v. Strachan*, 5 T. R. 107, note. *Roe v. Balduere*, *ibid.* 104. See the Observations on the former Case in Gilb. on Uses, Sugden's edit. 123, note.

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Sir *E. Sugden* and Mr. *Walker*, in support of the Demurrer, cited *Ambury v. Jones* (a).

Mr. *Knight*, Mr. *Preston*, Mr. *Flather*, and Mr. *Dickson*, in support of the Bill, cited *Brandon v. Sands* (b).

The VICE-CHANCELLOR :

The Prayer for General Relief is inserted by Counsel ; and, if it is found in a Bill which, in other respects, seeks Discovery only, it converts the Bill into a Bill for Relief. But the words, in the Prayer of Process :

“ To stand to and abide such Order and Decree, &c.” are “ inserted [*31] by the Clerk, and, therefore, do not make it a Bill for Relief.

In every Case, it ought to appear, most distinctly, whether the Bill is for Relief or for Discovery only ; for, if that matter is left in doubt, the Defendant may put in his Answer, and then the Plaintiff may amend his Bill by praying specific Relief. The general opinion of the Profession was against the decision in *Brandon v. Sands*.

I will, however, allow the Plaintiff in this Case to amend his Bill, by striking out the Prayer for General Relief.

EXTON v. SCOTT.

1833: 22 February.—*Deed—Escrow—Debtor and Creditor.*

A. having received Monies belonging to B. privately, and without any communication with B., prepared and executed a Mortgage to him for the amount. A. retained the Deed in his custody for 12 Years, and then died insolvent. After his death, the Deed was discovered in a Chest containing his Title-deeds. Held that the Deed was not an Escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A's Creditors.

L. HAMPSON, a Banker and Solicitor, was, under his Marriage Settlement dated in 1786, Tenant for Life of certain Estates in *Bedfordshire*, with remainder to his Daughters in Fee ; and the Trustees of the Settlement were empowered, with the consent of the Tenant for Life, to sell the Estates and lay out the Purchase-money in the purchase of other Estates to be settled to the same Uses ; and, in the meantime, the Purchase-money was to be invested in Government or Real Securities. In 1809, 1810, & 1812, *Edward Hampson*, the brother of L. Hampson, and the surviving Trustee of the Settlement, at the request of L. Hampson, sold certain [*32] parts of the settled Estates, and the Purchase-mones were paid in-

(a) 1 *Young*, 196.

(b) 2 *Ves. jun.* 514.

1833.—*Exton v. Scott.*

to *L. Hampson's* Bank, to an Account intituled, "*Messrs. L. & E. Hampson, Trust Money.*" The Monies so paid in, were afterwards invested in the purchase of Navy Five per Cents. in the name of *L. Hampson* alone, and, between January and August in 1812, he sold out part of the Stock, and in December 1814, he sold out the remainder, amounting to 5,000*l.*

In July 1811 and December 1812, *L. Hampson's* two Daughters married, and Sir *John Filmer* and *Richard Gilpin* were the Trustees of their Settlements.

By an Indenture, dated the 18th of December 1812, and expressed to be made between *L. Hampson* of the one part, and Sir *John Filmer* and *Richard Gilpin* (who were described as Trustees named in the Settlements made previous to and upon the Marriages of the two Daughters of *L. Hampson*, by *Frances*, his late Wife, deceased,) of the other part; after reciting that the Sum of 5,000*l.*, the net money arising from the sale of the part of the settled Estates in the County of *Bedford* comprised in the Settlement made upon the Marriage of *L. Hampson*, with *Frances*, his late Wife, was paid to and received by *Hampson*, and was then in his hands, as he thereby admitted and acknowledged, and that *Hampson*, previous to the Marriages of his Daughters, *undertook and agreed to execute a Mortgage, to Filmer and Gilpin, of the Messuages, Lands and Hereditaments thereafter mentioned and described, for securing the payment to them of the said Sum of 5,000l.*

upon the Trusts and for the purposes of the Settlements made previous to the Marriages of his said Daughters: It was *witnessed that, in consideration of the Premises, and for better securing the repayment of the 5,000*l.* to *Filmer* and *Gilpin* upon the Trusts and for the Purposes aforesaid, *Hampson* demised to them, all his Messuages, Lands, Hereditaments and Real Estates whatsoever, situate in the Parishes of *Luton* and *Caddington*, in the County of *Bedford*, then in the possession or occupation of him and his Tenants, for the Term of 500 years, subject to redemption on payment by *Hampson* to *Filmer* and *Gilpin*, of the Sum of 5,000*l.*, with lawful Interest for the same *from thenceforth*, upon the Trusts and for the Purposes aforesaid; and *Hampson* covenanted with *Filmer* and *Gilpin*, to pay to them the 5,000*l.* and Interest accordingly: and, by a Bond of even date, he became bound to them in 10,000*l.*, conditioned for payment of the 5,000*l.* with lawful Interest, on the 18th of July then next.

In March 1824 *Hampson* died insolvent and intestate; and a Suit was shortly afterwards instituted, by two of his Creditors on behalf of themselves and his other Creditors, to have his Estate applied in Payment of his Debts. The usual Decree having been made, Sir *John Filmer* and *Richard Gilpin* claimed, before the *Master*, to be paid the 5,000*l.* secured by the Bond and Mortgage, as a Debt due from the Testator at his decease.

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Sir *J. Filmer* made an Affidavit in support of the Claim, stating that *Hampson* was, at his death, indebted to him and *Gilpin* in 5,000*l.*, being the net Money arising from the Sale of part of the Estates comprised in *Hampson's* Marriage Settlement, which was paid to and received by him ; in consideration whereof he agreed to "execute the Bond and Mort- [*34] gage, for securing the repayment thereof to *Filmer* and *Gilpin* as Trustees of the Settlements made on the Marriages of his Daughters, upon whom the Estates would have descended if they had not been sold, and that he executed the Bond and Mortgage in pursuance of that Agreement ; and that the 5,000*l.*, with interest from *Hampson's* death, remained due from his Estate.

It appeared, by the Evidence in opposition to the Claim, that the Bond and Mortgage were privately prepared by *Hampson* himself, and were in his own handwriting ; that they were executed by him in his private Office, and when no one was present except himself and the Clerk who attested his execution ; that, a few days after his death, they were found in an Iron Chest, in his Bed-room, containing the Title-deeds relating to the Mortgaged Premises and other Estates, which were tied up in bundles separate from the Bond and Mortgage-deed ; and that, before *Hampson's* death, the existence of those Instruments was not known to the Persons to whom they were executed, or to any of the Persons interested under the same : and one of the Witnesses, who had been a Partner with *Hampson* in his Banking business, deposed that, on the 18th of December 1812, *Hampson* was indebted to certain Persons in Sums amounting to 3,600*l.*, which still remained unpaid, and that, on the same day, *Hampson*, as the Witness believed, was insolvent.

The Master having reported that the Bond and Mortgage were, in his opinion, void against *Hampson's* Creditors, *Filmer* and *Gilpin* excepted to the Report.

*Sir *E. Sugden* and *M. Thompson*, in support of the Except- [*35] tions :

At the time when *L. Hampson* executed the Bond and Mortgage-deed he had received the whole of the Trust-money ; and he had in his hands 5,000*l.* part of it. By getting the Fund into his possession, he constituted himself a Trustee of it. It was ear-marked as a Trust Fund : no Creditor could have claimed it. The moment that he assumed the character of a Trustee, this Court would give legal validity to all acts done by him, which he might have been compelled to do. By the Settlement of 1786, the Monies, until they were reinvested in the purchase of Lands, were to be laid out on Government or Real Securities ; and *Hampson* having the Money in his hands, and before he dealt with it gave a real Security accordingly. His assets were increased by the amount of the Money for which he gave

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the Security; and his Creditors have had the full benefit of it. As there was a Legal and Equitable obligation to do the act, and a sufficient consideration, it cannot be said that the Deed was voluntary: therefore the evidence that *Hampson*, when he made the Mortgage, owed Debts to the amount of 3,000*l.* or 4,000*l.*, which are still unpaid, is of no importance.

Sir *John Filmer*, in his Affidavit, states that *Hampson*, in consideration of his being indebted to him and *Gilpin* in respect of the 5,000*l.*, agreed to execute the Bond and Mortgage to them; and that he executed the Bond and Mortgage in pursuance of such Agreement; and the Deed recites that *Hampson* had so agreed. The mere circumstance that he retained [*36] the Deed in his custody, *does not affect its validity. *Lush v. Wilkinson* (a); *Doe v. Knight* (b).

Mr. *Knight* and Mr. *Turner*, for the Plaintiffs, in support of the Report: There are two questions in this Case: 1st. Whether the delivery of the Deed was sufficient to constitute it a complete Deed: 2d. Whether it is not void under 13 Eliz. c. 5.

A Deed, although formally sealed, delivered and attested, may be an Escrow. Both the old and the modern Cases have decided that, upon all the circumstances of the Case taken together, it is a question for a Jury whether there has been a complete delivery of a Deed. *Johnson v. Baker* (c). That Case proves that, though nothing is said by a Party to a Deed at the time of execution, he is not precluded from showing that it was not finally executed as a complete and perfect instrument. *Murray v. Lord Stair* (d). If the intention of the Grantor in this Case, when he executed the Deed and placed it in his Chest, was to retain it in his own power, the effect will be the same as if he had executed the Deed conditionally. *Doe v. Knight* only shows that the circumstances of that Case did not warrant the conclusion of the Jury. That Case is plainly distinguishable from this. Here the Deed was prepared and engrossed by the Grantor himself, and was executed by him in the presence of his Clerk only, (no Person intended to be benefited being privy to it,) and was kept by him in his Chest [*37] till his death. In **Doe v. Knight*, the Deed was delivered to a third Person, and placed out of the control of the Grantor, with a declaration that it belonged to the Grantee. Here the Deed never was out of the custody of the Grantor. In *Naldred v. Gilham* (e), there was no circumstance beyond the retainer of the Deed. The decisions in *Boughton v. Boughton* (f), and *Birch v. Blagrove* (g), proceeded upon the particular

(a) 5 Ves. 384.

(b) 5 Barn. & Cress. 671.

(c) 4 Barn. & Ald. 440.

(d) 2 Barn. & Cress. 82. See particularly pages 87, 88.

(e) 1 P. W. 577. But see

the observations of *Bayley J.* on this Case in 5 Barn. & Cress. 690.

(f) 1 Atk. 625.

(g) Amb. 264.

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circumstances of those Cases. The first Decree in this Cause, was the usual Decree in a Creditor's Suit, directing merely the common inquiries. *Filmer's* Affidavit was carried in by him, as a mere ordinary Creditor, under that Decree. The *Master*, in his Report, stated the special circumstances of the Claim, without coming to any conclusion as to its validity or invalidity. Then a subsequent Decretal Order was pronounced, directing, specifically, the *Master* to inquire and state whether the Mortgage and Bond were valid. It is clear that no such agreement as is stated by *Filmer*, could have been made. He does not say that there was any agreement with him, but only that it was agreed: and the Evidence proves that there could have been no communication between him and *Hampson*.

The Mortgage Deed is very informally prepared. No day of payment is mentioned in the Proviso for Redemption; and, though there is notice of the Trusts, no Power to give Receipts is vested in the Mort- [*38] gagees. The 5,000*l.* is made to carry Interest from the date of the Deed, although *Hampson* was entitled to a Life Interest in the Estates.

By the 6th Sect. of 13th Eliz., a Conveyance will not be valid as against Creditors, unless it be made *bonâ fide* and for valuable Consideration. A valuable Consideration, or *bona fides* alone will not do; they must both concur. Now here the Deed was secretly and informally made, and it contains a false recital. *Twyne's Case* (h). *Doe v. Knight* (i). The Grantor remained in possession of the Property comprised in the Mortgage, and he was in a state of Insolvency at the time. He did not part with the Deed, but kept it in his possession for 12 years. A Court of Equity, therefore, would not have compelled him to deliver up the Title-deeds to the Mortgagees, but would have said that the Deed was an incomplete instrument. *Dewey v. Bayntun* (k), *Pickstock v. Lyster* (l).

It was said that *Hampson* did not touch the Money until he had executed the Mortgage; but it appears, by the Evidence, that, before August 1812, he had possessed himself of Sums amounting to 4,927*l.*, exclusive of the 5,000*l.*

Mr. Rolfe and Mr. Barber, appeared for *Hampson's* Personal Representatives.

Sir E. Sugden, in reply:

The Mortgage Deed was not an Escrow. Nothing was to be done to precede its operation; but it was intended to operate from [*39] its execution. The Proviso for Redemption is quite correct: for *Hampson* was liable to be called upon to pay the Money at any time, and, therefore, he could not limit the time of Payment. If he was not called

(h) 3 Co. Rep. 80.

(k) 6 East. 257.

(i) See 5 Barn. & Cress. 695.

(l) 3 M. & S. 371.

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upon, he, being Tenant for Life, had the whole of his Life to pay it. A voluntary Deed cannot be affected under the 13th Eliz., unless the Grantor, when he executed it, was indebted to the extent of insolvency: here the Grantor continued in a state of solvency for 12 years after he executed the Deed.

The VICE-CHANCELLOR:

I take it to be proved that the Mortgage-deed was sealed and delivered by Mr. *Hampson*; and, therefore, it is good, unless it is shown either that there was fraud connected with the execution of it, or that it was intended to be delivered as an Escrow: but, in the latter case, there must be circumstances to show that the Deed was intended to take effect conditionally, and not absolutely.

Upon the Development of all the circumstances of the Transaction, there is no circumstance with respect to which this Deed can be considered to have been delivered as an Escrow: there is no Evidence to show that it was not intended to operate, immediately, as a security for the 5,000*l.* which *Hampson* had received. The Law then is, *primâ facie*, in favour of the Exceptants.

With respect to the recital that *Hampson* had agreed to execute the Mortgage, that recital is a mere matter of course: and, as he had received the 5,000*l.*, that circumstance would justify the security; and, [*40] consequently, *that mere recital, though it was not founded in fact, would not invalidate the Deed.

It appears, from the *Master's* Report made in pursuance of the Decree on the hearing of the Cause, that I am not at liberty to infer that *Hampson* was in a state of insolvency at the time when he executed the Security; for it appears that he was then indebted to the amount of 3,000*l.* or 4,000*l.* only. There being then nothing to show either inability to grant the Security, or Fraud, here, I have the fact that the Deed was sealed and delivered; and then I have the authority of the Law for saying that the mere retainer of the Deed, will not affect its validity.

Exception allowed.

TEBBOTT v. VOULES.

1833: 26th February.—Will.—Revocation.

A Testator devised all his Real Estates to his Children equally, and, afterwards, entered into Contracts for the sale of his Estates, but died before they were completed. The Purchasers afterwards abandoned their Contracts, because they were unable to procure a Conveyance from some of the Devises who were Infants. Held that, though the Contracts were properly abandoned, the Will was revoked as to the Premises therein comprised.

WILLIAM VOULES, by his Will dated the 17th of February 1827, devis-

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ed his Real and Personal Estates to all his Children, except *James Parker Voules*, their Heirs, Executors, Administrators and Assigns, as Tenants in Common. The Testator died in November 1828, leaving 13 Children him surviving, five of whom were Infants.

The Bill, which was filed by his simple-contract Creditors, in June 1830, stated (amongst other things) that "the Testator, sub- [*41] sequently to his Will, had entered into Contracts with different Persons, for the Sale to them of the greater part of his Estates, and which Contracts were subsisting and binding at his death, but none of them had then been completed. It prayed that, if the Testator's Personal Estate should not be sufficient to pay his Debts and Funeral Expenses, it might be declared that his simple-contract Creditors were entitled to have such of his Real Estates as were contracted to be sold, or the Purchase-monies for the same, applied to increase his Personal Estate for the benefit of his Creditors, and that the same might be applied accordingly; and, if it should appear that any of the Contracts had been abandoned and the Deposit Monies returned, that the Premises comprised in those Contracts might be resold, for the benefit of the simple-contract Creditors, to increase the Personal Estate.

The Decree made on the hearing of the Cause, directed the *Master* to inquire what Real Estates the Testator was seised of, and what Contracts he had entered into for the Sale of any and which of his Estates, and which of such Contracts were subsisting and binding at his Death, and which of the Purchasers were willing to perform their Contracts; and which of them refused to perform their Contracts; and whether any and which of their Contracts had been abandoned since the Testator's death, and by whom, and by whose order and authority, and whether they were, or were not, properly abandoned: but the Decree was to be without prejudice to any question as to whether any Contracts entered into by the Testator, did or did not operate as a revocation of his Will as to the Premises comprised in such Contracts.

"The *Master* found that the Testator was, at his death, seised [*42] in Fee of divers Real Estates, subject, as to the greater part of them, to Contracts, which he had entered into with different Persons subsequently to the Date of his Will, for sale to them of the same as thereafter mentioned: that, on the 25th of June 1828, the Testator caused various parts of his Estates to be put up for Sale, by Auction, in 24 Lots, subject to certain Conditions of Sale, by which it was stipulated, amongst other things, that the Purchaser of each Lot should pay down immediately, into the hands of the Auctioneer, a Deposit of 15l. per Cent., in part of the Purchase-money, and sign an Agreement for payment of the remainder on

or before the 29th of September 1828; and that the Purchaser of each Lot should have a Conveyance of the same, properly executed by the Vendor, upon payment of the remainder of the Purchase-money, and be entitled to the Rents of the parts let, and to Possession of the parts in hand, on and from Michaelmas 1828. The *Master* further found that, at the Auction, three of the Lots were bought in, and that the remainder were knocked down to the several Persons named in his Report; and that they paid to the Auctioneer, Deposits in part of their respective Purchase-mones, and signed Agreements for payment of the remainder and completion of their Contracts according to the Conditions of Sale; that Abstracts of the Title were delivered to the Solicitors for the several Purchasers, within the Time prescribed by the Conditions of Sale; but that, at the Testator's death, none of the Conveyances were completed, although the Solicitors for some of the Purchasers had prepared their Engrossments, and others had sent the Drafts for perusal by the Vendor's Solicitor, and some had

[*43] *not completed the investigation of the Title; and that, upon the investigation of the Title, the Purchasers had objected that they could not obtain a Legal Title to the Entirety, by reason that several of the Cod devisees were Infants, and no efficient Conveyance could be made by them during their Minorities; that, in April 1829, five of the Purchasers named in the Report, demanded and received back their Deposits, and refused to perform their Contracts, but that *G. Baylis*, the Purchaser of Lots 6 & 8, and *T. George*, the Purchaser of the Lots 7 & 10, were both willing to perform their Contracts. The *Master* was of opinion that all the aforesaid Contracts *had been properly abandoned* by all Parties, except the aforesaid Contracts entered into with *Baylis* and *George*, who were willing to perform the said Contracts, and which he was of opinion were *subsisting and binding Contracts at the Testator's death*; and that all the Deposits had been properly returned, except those made by *Baylis* and *George*.

Mr. *Treslove* and Mr. *K. Parker*, for the Plaintiffs, said that the Testator's Estate was insufficient for payment of his Debts, and, as he had shown an intention to convert his Real Estates into Personalty, the Court ought to give his simple-contract Creditors the benefit of the Contracts.

Mr. *Preston*, for the Defendant *W. J. Voules*, the Testator's heir:

As all the Contracts were entered into by the Testator after the date of his will, and were binding at his death, his Will was revoked as to the Premises therein comprised.

[*44] **[The Vice-Chancellor:—In this Case the Testator had so dealt with the Legal Estate, as to make it impossible that the Contracts could be performed.]*

He made his Will before he entered into the Contracts; and, by those

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Contracts, he revoked his Will. It is enough for me to contend that he died in such a state that there were Contracts binding upon him. An Act of Parliament might have been obtained in order to procure a Conveyance from the Infants. *Whittaker v. Whittaker* (a); *Broome v. Monk* (b); *Knollys v. Alcock*; *Bennett v. The Earl of Tankerville* (d). In this last Case Sir *W. Grant*, M. R. says: "The question must now be decided, as if it had arisen the day after Lord *Tankerville's* death. If, at a period, the Will stood revoked, with regard to these Lands, by his death, how by any subsequent event, can that Devise again become operative and effectual? Even if the Contract had been abandoned in the Testator's life, I very much doubt, whether that would have set up the Will again without a Republication; but, being revoked at the time of his death, by a valid, subsisting Contract, it is immaterial to the Devisee what becomes of the Land, his only Title being gone by the Revocation of the Devise."

Mr. *Lovat*, for the Defendants, the Devises:

The Testator, by his own act, rendered it impossible that the Contracts, should be performed; and the Master has found that all the Contracts, except those which were entered into with *Baylis* and *George*, have been properly abandoned; the Will, therefore, was not revoked [*45] as to the Premises which were comprised in any of the Contracts except those with *Baylis* and *George*. *Eilbeck v. Wood* (e); *Matthews v. Venables* (f).

The VICE-CHANCELLOR:

In *Eilbeck v. Wood*, the Appointment of 1811 was executed by the Wife after she had exhausted her Power. It was mere waste paper; and no Interest vested in the Appointee under it.

The question which has been raised in this Case, is quite settled by *Bennett v. The Earl of Tankerville*. If, at the time of the Testator's death, the Contracts were such that the Testator might have enforced them against the Purchasers, or the Purchasers might have enforced them against the Testator, the Contracts were a Revocation of the Will.

Declare that the Contracts entered into by the Testator for the sale of his Real Estates, operated as a Revocation, in Equity, of the Devise of such Real Estates contained in his Will, and that the same descended to the Defendant *W. J. Voules*, as the Testator's eldest Son and Heir-at-Law. Decree the Contracts with *Baylis* and *George*, to be carried into Execution; and the Defendant, *W. J. Voules*, the Heir-at-Law, consenting to the Sale of therest of the Estates comprised in the Contracts, for the payment

(a) 4 Bro. C. C. 31.

(d) 19 Ves. 179.

(b) 10 Ves. 597.

(e) 1 Russ. 564.

(c) 5 Ves. 648.

(f) 2 Bing. 136.

 1833.—Robinson v. Smith.

of the Testator's Debts, let the same be sold, and let the Monies arising from the Sales be paid into Court.

[*41]

*RANDS v. PUSHMAN.

1833: 27th February.—Practice.—Exceptions.

On the hearing of Exceptions to a *Master's* Report, no parts of the Answer can be read, except those which were read before the *Master*.

THIS was a Bill for an Account, against an Executor, seeking to charge him with wilful default; and the *Master*, in taking the Accounts directed by the Decree, had charged him accordingly. The Defendant then excepted to the Report; and, upon hearing the Exceptions, the Plaintiffs were proceeding to read passages in the Answer which had not been read before the *Master*. The Defendant's Counsel objected to the reading of those passages, saying that, on the hearing of Exceptions to a *Master's* Report, no passages in the Answer could be read, which were not read, before the *Master*; in his Report, referred to the Answer generally, yet, in the Exchequer, the *Master* set out all the passages in the Answer which were read before him.

The *Vice-Chancellor* ruled that such passages only could be read, on the hearing of the Exceptions, as had been read before the *Master*.

Mr. Knight and Mr. Bethell for the Exceptions.

Sir E. Sugden and Mr. Griffith Richards for the Report.

[*47]

*ROBINSON v. SMITH.

1833: 4th March.—Will.—Construction.—Husband and Wife.—Personal Representatives.

Testator bequeathed 700*l.* to his Daughter's Husband, his Executors, &c. in trust to pay the Interest to his Daughter, for her separate use for life, and after her death, to such persons as she should appoint by Will, and, in default of Appointment, to her Personal Representative. The Daughter died without having made any appointment. Held that her Next of Kin, to the exclusion of her Husband, were entitled to the 700*l.*

THE Testator in this Cause bequeathed 700*l.* to *M. Smith*, his Executors, &c. in Trust that he, his Executors, &c. should invest the same in the usual Securities, and pay the Dividends and Interest thereof to the Testator's Daughter *Sarah*, the Wife of *M. Smith*, for her separate use, for life, and

1833.—*Styth v. Monro.*

after her Decease, in Trust that *M. Smith*, his Executors, &c. should pay the Trust-monies to such Persons as *S. Smith* should by Will appoint, and, in default of appointment, to her *Personal Representatives*.

Sarah Smith died, in her Husband's lifetime, without having made any Appointment of the Fund. Then *M. Smith* died, without having taken out Administration to his Wife; and, after his death, one of her Next of Kin took out Administration to her, and filed the Bill in this Cause, claiming the Fund, against the other Next of Kin and the Executors of *M. Smith*.

Mr. *Lovat*, Mr. *Koe*, and Mr. *Elderton*, for the Plaintiff, and the other Next of Kin of the Wife.

Mr. *Rolfe* and Mr. *Hall*, for the Husband's Executors, argued that the words "Personal Representatives," were synonymous with "Executors and Administrators," and that, as a Gift to *A.* for life, and, after his death, to his Executors or Administrators, would give *A.* the absolute Interest, so, under the Trusts declared in this Case, Mrs. *Smith* took an absolute Interest in the Fund. *Saberton v. Skeels* (a); *Anderson* ['48] v. *Dawson* (b): that the question arose upon a Will, and not in a Marriage Settlement, which was the Husband's Deed, and, therefore, derogated from his Rights, and was always to be constructed against him: that the Testator could not know who the Next of Kin of his Daughter would be, and, therefore, could not intend to benefit them.

The VICE-CHANCELLOR:

The Husband and his Executors are made Legatees of the Fund, merely as Trustees. The Testator considered that his Daughter might die, either in the lifetime of her Husband, or after his death; and, therefore, he provided that the Husband, or his Executors, should pay the Fund. But the Counsel for the Executors contend that they are not to pay, but to retain the Fund. I am, however, of opinion that the Testator intended to give, to the Husband, his Executors and Administrators, nothing but a Trusteeship, and, consequently, that they are excluded from all beneficial Interest in the Fund (c).

**STYTH v. MONRO.*

['49]

1834: 23d July.—*Will.—Construction.—Representatives.*

The word "Representatives," in a Will, construed to mean "Descendants," the context requiring it.

JANE MONRO, by her Will, directed her Trustees to convert all her Real

(a) 1 Russ. & Myl. 587.

(b) 15 Ves. 532, see 536.

(c) See *Baines v. Otley*, 1 Myl. & Keen, 465, and see next Case.

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and personal Estate into Money, and disposed of the same, when so converted, as follows : “ I give and bequeath, unto every one of my Uncles, Brothers of my late Father, 20*l.* each, or their respective Representatives : I give and bequeath, unto every one of my Aunts, sisters of my late Father, each 20*l.*, or their respective Representatives. And all the rest and Residue of the said Money or Trust Estate I give and bequeath as follows, (that is) I give and bequeath, unto the respective Representatives of the Sisters of my late Grandfather *E. Fox*, one Half-part or Share of my said Rest and Residue of Money or Trust Estate, namely, one Moiety of the said Half-part to the Representatives of *Bridget*, Sister of my said Grandfather, the other Moiety to the Representatives of *Elizabeth*, Sister of my said Grandfather ; and I give and bequeath unto the Descendants of the late *James Atkinson*, Brother of my late Grandmother, *Jane Fox*, the other Half-part or Share of my said Rest and Residue of Money or Trust Estate, namely, One-third of the said Part or share, to the Representative or Representatives of *Mary*, Daughter of the said *James Atkinson* ; one other Third of the said Part or Share, unto the Representatives of *Betty*, Daughter of the said *James Atkinson* ; the other remaining Third of the said Part or Share, to the Representatives of *Joyce*, Daughter of the said *James Atkinson*.”

[*50] “The Bill was filed, by the Administrator of the Testatrix with her Will annexed, (who was one of her Next of Kin,) against her Co-heirs and certain Persons claiming to be the Next of Kin of two of the Sisters of *E. Fox*, praying that the Will might be established, the Trusts performed, and the Rights and Interests of the Plaintiff and all other Parties, to and in the Testatrix’s Residuary Trust Estate, ascertained and declared.

Mr. *Knight* and Mr. *Simons*, for the Plaintiff, said that it appeared, by the Context of the Will, that the Testatrix, by “ Representatives,” meant “ Descendants.” And,

The *Vice Chancellor*, being of that opinion, referred it to the *Master*, to inquire and state how many Brothers and Sisters the Testatrix’s late Father had, and whether they were living or dead, and, if they were dead, when they respectively died ; and whether *Bridget* and *Elizabeth*, the Sisters of the Testatrix’s Grandfather, *E. Fox*, and *Mary*, *Betty* and *Joyce*, the Daughters of *James Atkinson*, the Brother of the Testatrix’s Grandmother, *Jane Fox*, or any and which of them were living or dead ; and, if dead, when they respectively died, and what Descendants they had respectively living at the Decease of the Testatrix, and in what degrees, and whether any and which of such Descendants had since died, and who were their respective Personal Representatives (a).

Mr. *Wilbraham* appeared for the Defendants.

(a) See the preceding Case.

1833.—Hoare v. Peck.

*HOARE v. PECK.

[*51]

1833: 9th March.—*Pleading.—Demurrer.—Statute of Limitations.*

Where it appears, on the face of the Bill, that the Cause of Suit accrued more than six years before the filing of the Bill, a Defendant need not plead the Statute of Limitations, but may Demur.

THE Plaintiff sought, by his Bill, to be compensated, by the Defendants, for the Loss he had sustained on the Sale of a quantity of Spices, which he alleged he had been induced to purchase by the fraudulent representations of the Defendants. It appeared, on the face of the Bill, that the Plaintiff purchased the Spices in March 1826, and that he discovered the alleged Fraud in July 1829; but he did not file his Bill until February 1833.

The Defendants put in a general Demurrer.

Sir E. Sugden and Mr. Teed, in support of the Demurrer, relied on the Statute of Limitations, and said that, if a Party came into a Court of Equity on the ground of Fraud, the Court would not relieve him, if he had discovered the Fraud for a considerable time before he filed his Bill.

Mr. Pepys and Mr. O. Anderson, in support of the Bill, said that the time did not begin to run until the discovery of the Fraud: *Booth v. The Earl of Warrington (a)*; *Bright v. Lynon (b)*: and that the Statute of Limitations must be taken advantage of by Plea, and not by Demurrer.

THE VICE-CHANCELLOR:

It is competent to a Court of Equity, in cases like *the present, [*52] to determine whether it will itself interfere, or leave the Party to his remedy at Law.

It appears, on the face of the Bill, that, in 1829, the Plaintiff was fully apprized of his Loss; and yet he did not file his Bill until February 1833. Why, therefore, should he not be left to his remedy at Law? I cannot, however, but think that it has been decided that, where it appears, on the face of the Bill, that the Cause of Suit arose more than Six Years before the filing of the Bill, the Defendant may Demur (c).

My opinion is that the Cause of Action accrued the moment the Money was applied in Payment for the Goods, and that the subsequent Discovery of the Fraud has nothing to do with it.

Demurrer allowed.

(a) 4 Bro. P. C. 163.

(b) 1 Burr. 391.

(c) See *Foster v. Hodgson*, 19 Ves. 180; *Earl Deloraine v. Browne*, 3 Bro. C. C. 633, and the Authorities referred to in Mr. Bell's Note to that Case.

1833.—*Newton v. Lucas.***BLAKENEY v. BLAKENEY.**1833: 12th March.—*Will.—Construction.*

Testator bequeathed the remainder of his Property to his Sister, *A. B.*, to dispose of amongst her Children as she might think proper. Held that *A. B.* took no interest in the Residue.

EDWARD NEWCOME, made his Will, dated the 25th of February 1817, as follows: "I give and bequeath to my dear Mother, *Anna Maria Newcome*, the entire of my Property which I derive under my Father's Will, or which in any other way I should or shall be possessed of, recommending my dear Mrs. *Elizabeth Harvey* to be amply provided for by her. It is my request, should my Mother survive me, that she will leave 500*l.* a piece to each of my Sister *Jemima's* three Daughters, and 1,000*l.* to *Alicia Blakeney's* eldest Daughter; 500*l.* to Mrs. *E. Harvey*; and the remainder of my property to my Sister *Alicia Blakeney*, to dispose of amongst her Children as she may think proper.

The Testator died in March 1821, leaving his Mother surviving him. She died in March 1828.

The Bill was filed in May 1832, by the four Sons of *Thomas* and *Alicia Blakeney*, all of whom were adult, and the question was whether *Alicia Blakeney* took a Life-interest under the Residuary Bequest in the Testator's Will.

Mr. *Girdlestone*, jun., for Mr. and Mrs. *Blakeney*, cited *Burrell v. Burrell* (a).

Sir *E. Sugden*, Mr. *Jacob* and Mr. *Blunt*, appeared for the other Parties.

The VICE-CHANCELLOR:

I confess it seems to me that, by the words of the residuary Bequest, no Interest is given to *Alicia Blakeney*.

Declare that the Defendant *Alicia Blakeney* has no Interest in the Testator's Personal Estate.

[*54]

NEWTON v. LUCAS.

1833: 13th and 15th March.—*Will.—Construction.*

Testatrix devised all her Messuages situate in *Denmark-court*. She had five Houses situate in the Court, and another which fronted towards the Strand, and formed one side of a covered Passage leading to the place where the five were situate, and which had attached to the back of it, an Outbuilding abutting on ground in *Denmark-court*. Held that the Five Houses only passed.

KITTY LEVY NEWTON, by her Will dated the 12th of August 1823, de-

(a) Amb. 660.

1833.—Newton v. Lucas.

vised, to Trustees, all those her Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*, *Haydon-square*, *Hen-nage-lane* and *Booker's-gardens*, to hold to them, their Heirs and Assigns, upon Trust, out of the Rents, to pay certain Annuities, and, subject thereto, to hold the said Messuages, Lands, Tenements and Hereditaments in *Denmark-court* and *Haydon-square*, upon the Trusts therein mentioned.

The Testatrix was seised of five Freehold Houses, numbered 15, 18, 19, 21 and 22, which were admitted to be situate in *Denmark-court*. She was also seised of another Freehold House, numbered 383, situate in, and fronting towards, and having its principal entrance on the North side of the *Strand*, and having adjoining to it, at the back, an Outbuilding, of much lower elevation than the House, and appearing to have been built after it. This Outbuilding was used as a Bakehouse, and one end of it abutted on ground admitted to be in *Denmark-court*. A narrow way or passage, which appeared to have been made through the ground floors of the House numbered 383 and the adjoining House numbered 382 in the *Strand*, and which was covered by parts of the first floors of those two Houses, led, northwards from the *Strand* to the place in which the five Houses were situate, and was much narrower than that place. The House numbered 383, had a side door (which was not numbered) opening into the Passage; [*55] and the words, "*Denmark-court*" were painted on the Walls or Door-posts of the Houses numbered 382 and 383, at the Entrance of the Passage nearest the *Strand*, and also on the House numbered 21, which was next beyond the Bakehouse.

All the Houses admitted to be in *Denmark-court*, were uniform in structure; but differed, in that respect, from the House numbered 383, and were greatly inferior to it in elevation and size.

The Houses numbered 382 and 383, and those to which the Passage led, had all formerly been one entire Estate; and Numbers 382 and 383 were described in the Title deeds and Leases, and in the Assessments to the Land-tax and Poores'-rates, as situate in the *Strand*, and the others, as situate in *Denmark-court*.

The Estate afterwards became joint Property, and the Proprietors having agreed to make partition, Number 383, which was described, in the Award, as situate in the *Strand*, and Numbers 15, 18, 19, 21 and 22, as in *Denmark-court*, were allotted to the Person under whom the Testatrix claimed; and Number 382, which was described as in the *Strand*, and the rest of the Houses, which were described as in *Denmark-court*, were allotted to the other joint Proprietor. The Letters to and from the Occupiers of Number 383, were directed to and dated from the *Strand*, and they were described, in Deeds and in their Cards of Address, as being resident there.

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1838.—*Newton v. Lucas.*

The only instance in which Number 383 was differently described, [*56] was in an Agreement which the Testatrix entered into, in 1825, to grant a Lease of that House to *W. Ward*, in which it was described as situate in *Denmark-court-passage*, but *Ward*, who was then in the occupation of the House, was described, in the Agreement, as of the *Strand*.

The Plaintiff's Witnesses represented *Denmark-court* as consisting of the Passage as well as the place into which it opened on the North : and one of them said that all the six Houses were known to the Testatrix as, and called by her, " Her *Denmark-court* Houses : " but, in a Map or Plan, which they said was a correct Map or Plan of *Denmark-court* and the Houses, Streets and Places adjacent thereto, the House numbered 332, was omitted.

The Defendant's Witnesses described *Denmark-court* as consisting only of the Place into which the North end of the Passage opened.

The Bill was filed by Parties beneficially interested under the Will, against the Testatrix's Heir and certain other Persons, praying to have the Will established and the Trusts performed.

The principal question in the Cause, was whether the House numbered 383, passed under the before-mentioned devise.

Mr. Pepys and *Mr. Wigram*, for the Plaintiffs :

The question in this Case, is not between two conflicting Descriptions, but between one Description and an Intestacy. The House in question might, with equal, or, perhaps, greater propriety, be described as in [*57] " the *Strand* ; but it cannot be denied that the description in the Will does, in some degree at least, apply to it. The House was used as a Baker's Shop ; and it is admitted that the Bakehouse abutted upon *Denmark-court*. The words "*Denmark-court*" were written upon the sides of Numbers 382 and 383, at the entrance to the Court from the *Strand*.

It appears, from the Agreement which the Testatrix entered into with *Ward*, that she did not describe the House as being in the *Strand*. If the description is not sufficient, by itself, to pass the House, then, as it is clear that the description does, in some sort at least, apply to it, the Evidence that the Testatrix called the Houses her *Denmark-court* Houses, is admissible. *Miller v. Traverse* (a) ; *Beaumont v. Fell* (b) ; *Selwood v. Mildmay* (c) ; *Price v. Page* (d) ; *Hampshire v. Peirce* (e) ; *Thomas v. Thomas* (f).

Sir E. Sugden, *Mr. Garratt* and *Mr. Jacob*, for the Defendant, the Heir-at-law of the Testatrix :

(a) 8 Bing. 244.

(b) 2 P. W. 141.

(c) 3 Vcs. 306.

(d) 4 Vcs. 650.

(e) 2 Vcs. 216.

(f) 6 T. R. 671.

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The Evidence that the Testatrix called the Houses, her *Denmark-court* Houses, is not admissible. Evidence cannot be given to show that the Testatrix considered Property not coming within the description which she has used, as included in it. *Doe v. Oxenden* (g). The same point was established in *Miller v. Travers*. You cannot go into Evidence as to the use of Language by a Testatrix, contrary to its known import. In the [*58] Title-deeds, and, especially, in the Conveyance to the Testatrix, and also in the Assessments to the Land-tax and Poor-rate, the House in question was described as in the *Strand*, and the other Houses, as in *Denmark-court*. The Persons resident in the House, always described themselves as of the *Strand*. *Doe v. Greening* (h); *Doe v. Lyford* (i) *Doe v. Pigott* (k). The Passage could not be part of the Court; for it was cut through the ground-floors of the two Houses in the *Strand*: and, though there is some Evidence that the words "*Denmark-court*," were written on the side of the Passage, yet that Evidence is not clear or satisfactory: and we have proved that the same words were written on Number 21 in the Court.

Besides, there is sufficient Property to answer every word in this Will: and, if the Court cannot say that it is certain that this House passed, the Heir must take it, for he cannot be disinherited by doubtful words. *Doe v. Roberts* (l); *Doe v. Bower* (m).

Mr. Pepys, in reply:

None of the Cases that have been cited, are applicable. In *Doe v. Oxenden*; *Miller v. Travers*; *Doe v. Pigott*; *Doe v. Bower*; *Doe v. Greening* and *Doe v. Lyford*; there was Property that answered the description and other Property to which it was totally inapplicable. Words of local description were used, and there was Property to which that description was correctly applicable, but it was totally inapplicable [*59] to the Property in dispute; and, consequently, the evidence tendered went to contradict the Will. *Doe v. Roberts* is in our favour; for it shows that it is not necessary to use the most correct description of Property, provided words are found which are sufficient to include it. The question is, whether the House is so situated that it may have the description of a House in *Denmark-court*. In *Miller v. Travers* there was no description applicable to the Property in question, and, therefore, it was held not to pass. If the words which a Testatrix has used in describing her Property, are applicable to it, in some sort, though incorrectly, the Property will pass. Our Witnesses prove that the place in question was called *Denmark-court* down to

(g) 3 Taunt. 147, and 4 Dow, 65.

(h) 3 M. & S. 171.

(i) 4 M. & S. 550.

(k) 7 Taun. 553.

(l) 5 Barn. & Ald. 407.

(m) 3 Barn. & Adol. 453. See Wigram on Extrinsic Evidence, 54, et seq.

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the opening of the Passage into the *Strand*: they all include the Passage as part of the *Court*.

Great stress has been laid upon the fact that "*Denmark-court*" was written upon Number 21. In every Street of any extent in *London*, the name of the Street is written on the different Divisions of it. There was a break in the Court, and, therefore, the Name was repeated. The Tenant of Number 383, has been examined as a Witness for the Defendants; but they have not ventured to ask him whether "*Denmark-Court*" was or not written on the side of his House. We do not deny that the House was in the *Strand*, but we say that it was also in *Denmark-court*. Indeed the greater part of the House was in *Denmark-court*; and it is not even disputed that the Bakehouse, which was attached to the House, was in the Court. *Ward*

and the other Tenants of the House, say that they described [*60] themselves as of the *Strand*; but they might also have described themselves as of the Court. A Person who lives in a House, which is situate at the corner of a Square and of a Street, may describe himself as being either of the Square or of the Street.

If the Testatrix had had no House except the one in question, there can be no doubt, and indeed it has been admitted, that it would have passed; and, if that be so, the Evidence that the Testatrix called the Estate her "*Denmark court Houses*" is admissible. *Wigram on Extrins. Evid.* 76, *et seq.* We, therefore, submit that there is sufficient in this Case, to authorize the Court to hold that the House Number 383, passed by the Devise in question.

The VICE CHANCELLOR:

In this Case the question is, what Property passed by the following devise in the Will of *Kitty Levy Newton*: "I give and devise all those my Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*, *Haydon-square*, *Hennage-lane* and *Bookers-gardens*."

It is admitted that the Testatrix had Five Freehold Messuages in *Denmark-court*: and she had another Messuage with respect to which the question is whether it was, in fact, situate in *Denmark-court*, or, if it were not in *Denmark-court*, whether it was not so treated, by others and by her, as to be capable of passing, with the other Five, under the description of "My Freehold Messuages, Lands, Tenements and Hereditaments, situate in *Denmark-court*."

There is no great difficulty in ascertaining what is the rule of [*61] Law upon questions of this kind. If a Testator devises Property by a description which completely tallies with it, you are not at liberty to say that some other Property than that with which the description, tallies, passed by the Devise.

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In *Doe v Greening* (a), the Testator gave all his Messuages, Lands and Tenements at *Coscomb*, in the County of *Gloucester*; and it was attempted to give evidence that a portion of his Property, called *Farmcott*, was formerly united to, and had been, ever since, enjoyed with the Estate at *Coscomb*, in order to show that it passed by the Devise. It was nevertheless held that, inasmuch as the Testator had an Estate at *Coscomb*, Evidence was not admissible to show that, under that description, Property not at *Coscomb* passed. But where a Testator gives Property by a description which is not strictly applicable, Evidence is admissible to show what he meant by the words which he has used. Thus, in *Doe v. Roberts* (b), a Testator, who had, by his Marriage Settlement, settled all his Property in the County of *Flint*, so that he had in himself the Reversion in Fee in default of Issue by his Wife, by his Will, after reciting the Settlement and that he had no Issue by his Wife, devised as follows: "I give and devise all the said Capital and other Messuages, Lands, Tenements and Hereditaments, with their Appurtenances, in manner and form following." So that, in the first place, there was a clear intention to pass all the Property that was comprised in the Settlement. And he then said: "That is to say, as concerning all that Messuage situate in *High-street*, in the Town of *Holywell*, in the County of *Flint*, wherein my Mother inhabits, and nearly opposite the *White Horse Inn*, together with the Shop adjoining the same Messuage, and all and every my Buildings and Hereditaments in the same Street, I give and devise the same unto and to the use of my said Mother, for her natural life." It appeared that the Testator had a Capital Messuage in *High-street*, which his Mother inhabited, and that there was an entrance, under an Archway, out of *High-street*, to a Court behind it, in which there were, on the side of it fronting the back of that Messuage, two Cottages; and the question was whether those Cottages passed. It is observable that there was nothing to which the words, "and all and every my Buildings and Hereditaments in the same Street," could apply, except the Cottages, which were part of the settled Property; and it was held that those Cottages did pass under that description, though, in strictness, it was not a correct description of them.

In the present Case, I have first to consider whether the words which this Testatrix used, can be held to include the Messuage in question, having regard to the Evidence of one of the Plaintiff's Witnesses who has deposed that all the Six Messuages were known to the Testatrix, and called by her by the name of her *Denmark-court* Houses. She has not, however, used that name in making this devise; for she has used the terms "my Freehold

(a) 3 M & S. 171.

(b) 5 Barn. & Ald. 407.

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Messuages, Lands, Tenements and Hereditaments, situate in *Denmark-court*."

With respect to the other Evidence, it stands thus: Several Deeds, the earliest of which is dated in 1789, have been produced, from which it appears that two Houses, described as Numbers 382 & 383 in the *Strand*, and several Houses in *Denmark-court* all belonged, as one property, to one Person; and that they afterwards "became joint Property, and a partition was made by which the House Number 383, which is the subject of the present dispute, was allotted, as a House in the *Strand*, along with the Five Messuages which are unquestionably in *Denmark Court*, to the Person under whom the Testatrix claimed, and that the other portion of the Property was allotted, by the description of the House Number 382 in the *Strand*, together with the rest of the Houses in *Denmark court*, to the other joint-owner. A Lease was made in the year 1799, by which the House in question is described as "all that Messuage or Tenement, Bakehouse and Premises, situate and being in the *Strand*, in the Parish of *St. Martin's in the Fields*, in the County of *Middlesex*, with their and every of their Appurtenances, Number 383," and that description, it must be observed, included the Bake-house as being in the *Strand*: and an Assignment of the same Premises, made in 1808, contains precisely the same description: and, in the Deed by which the Property was conveyed to the Testatrix, Number 383 is described as in the *Strand*. Then the Testatrix, herself, agreed to grant a Lease to a Person of the name of *Ward*, whose Evidence shows that he was in the occupation of the House at the time; because he states that he had lived in the House for more than 22 years, which covers the time at which the Agreement was made. That Agreement was made between *Kitty Levy Newton* of the one part, and *William Ward, of the Strand*, in the County of *Middlesex*, Baker, of the other part, (but he was no otherwise of the *Strand* than as being an Inhabitant of the House in question,) and she agrees that she will demise to him, all that Messuage or Tenement, Number 383, situate and being in *Denmark-court passage* in the *Strand*, in the said County of *Middlesex*.

[*64] "And, with respect to this part of the Evidence, the following observation is applicable, which Mr. Justice *Holroyd* makes in the Case of *Doe v. Roberts*, where he is speaking of the Cottages which were behind the *High-street*: "The only way to these Cottages was through the *High-Street*, and there was no thoroughfare through *Bakehouse-lane*. If there had been an opening, from the *High-street*, to these Two Cottages alone, they would clearly be in the same Street." And the learned Judge certainly seems to consider that the Passage which led to the Cottages from the Street, might be considered as part of the Street itself.

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Then there is Evidence produced which shows that *Denmark-court* ran, at right angles, from the North side of the *Strand*, and that then there was a turning in it, so that it was continued in a line parallel to the North side of the *Strand*. And it is proved that there was a covered Passage which led from the *Strand* to the place in which the Five Houses which indisputably were in *Denmark-court*, were situated: and it is also proved that, at the Entrance of the Passage, on the East side of it, there was painted, "*Denmark-court*," and that, on the posts of the Door which opened from the covered Passage into the House Number 383, (which House formed the West side of the Passage,) the same words were painted. Two or three of the Plaintiff's witnesses certainly speak of the Passage itself as being part of *Denmark-court*. It is, however, observable that the same Witnesses speak of the Map that has been produced, as being a true and correct Map or Plan of *Denmark-court* and of the Houses, Streets and Places adjacent thereto; but that Plan, which, according to their representation, is a Plan of *Denmark-court* and of the Houses, Streets and ['65] Places adjacent thereto, omits altogether, as one of the Houses adjacent thereto, the House Number 382, which was on the East side of the Passage; and, consequently, they represent the Passage as being no part of the Court.

I cannot but think that the weight of Evidence is vastly in favour of the fact that Number 383 was no part of *Denmark-court*. For, in addition to the Deeds, there are the Rates and Assessments to the Land Tax and the Poors' Rates, (which are the most authoritative declarations as to situation,) in all of which there is a marked distinction made between Number 388 as being in the *Strand*, and the other Houses, which were unquestionably in *Denmark-court*.

For the purpose of determining whether a House is in one Street or in another, the structure of the Buildings ought to be considered. The Houses numbered 382 and 383 have corresponding roofs, and the backs of them extend Northwards. The Houses in *Denmark-court*, which were all uniform Buildings, were of an inferior description, and of a differend construction; and, if they had any outlet, it extended Westward, which was in a different direction from the outlet of the other two Houses, and the gable end of the Southward House in the Court, fronted the back of the House Number 383, and had its own front turning towards the East. If, therefore, any Person walking along the *Strand*, had been asked whether the House Number 383 was in the *Strand* or in the Court, he would have said that it was in the *Strand*, and not in the Court.

It is also a remarkable circumstance that, notwithstanding ['66] the words "*Denmark-court*," were written on the side of Num-

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ber 383, under the covered Passage, there is no evidence to show that the Door which opened into the Passage, was numbered as being 23 in *Denmark-court*. And I do not think that the Name, unaccompanied by the Number, tends to show that the House in question, was in *Denmark-court*.

Moreover, it was proved by Persons who had lived in the House, that the Letters and References which they received, were all addressed to them as the Occupiers of a House in the *Strand*; and, therefore, it is plain that there must have been impressed, on the House, the character of a House in the *Strand*; so that the Testatrix, when he spoke of her Houses in *Denmark-court*, did not, in point of Law, describe this House.

When a question is made, with respect to a House at the corner of a Street and of a Square, whether it belongs to the Square or to the Street, the question must be determined, (notwithstanding the door may be in the Street), by ascertaining whether the House corresponds with the Houses in the Street or in the Square, Mr. *Pepys* said that, if a Person had a House which stood at the corner of a Square and of a Street, and were to describe the House either as being in the Square or as in the Street, the House would pass; and there can be no doubt that it would. But that is the question before me: because if this Testatrix had not had the Five Houses in *Denmark-court*, and had devised her Messuage in *Denmark-court*,

[*67] there is sufficient of Evidence in this Case, to allow the House number 383 to pass. But, as it is quite plain *that Number 383 was not situate in *Denmark-court*, and as she had Houses which would satisfy the description which she has used, the House Number 383, cannot be held to have passed by the words: "My Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*."

HASTINGS v. HANE.

1833: 16th-March.—Will.—Construction.—Ecclesiastical Court.

▲ Testator, after giving specific and pecuniary Legacies, willed that A. and B. should divide, equally, any Monies which might remain to his Account after payment of his Debts and pecuniary Legacies. The Testator, at the date of his Will and at his death, had Money-accounts subsisting between him and his Bankers, and other Persons. Held that the Bequest did not pass his Residuary Estate, but only the Balances due on those Accounts, subject to the Debts and Legacies.

This Court is not bound by the decision of the Ecclesiastical Court as to the effect of a Bequest.

FRANK ABNEY HASTINGS, by his Will dated the 23d of September 1825,

1833.—Hastings v. Hanc.

after giving several specific and pecuniary Legacies, gave the Residue of his Property and Effects to *J. Macdowall*, and appointed him and Sir *Edmund Antrobus*, Executors of his Will.

The Testator, soon after the Execution of his Will, sailed for *Greece*, entered into the service of the *Greek* Government, and was appointed to the Command of a *Greek* Steam Vessel of War, which was called, in English, "*The Perseverance*," and, in Greek, "*Kateria*." Whilst on board this Vessel he wrote, as follows, on the back of one of the Sheets of a Duplicate of his Will.

"On Board the *Perseverance* Steam Vessel, at Sea.—June 20th, 1826.—I hereby Revoke these my former Dispositions of my Property; and being, as I believe, 'unable to make any legal Transfer ['68] or Legacy of my Property from on board this Vessel, I can only request that Captain *Edward Scott*, R. N., the same mentioned in my former Testament, may inherit my Books, Instruments, Charts, Maps, Arms, and 1,000*l.* Sterling; and that *George Finlay*, now on Board this Vessel, may inherit 500*l.* Sterling; and that my Servant, *A. Ross*, may inherit all my Wearing Apparel, Stores, Wine, Plate, &c.; also that Mr. *Nicolo Kalergy*, Greek, now at *Tinos*, and Mr. *J. Hane*, Officer on Board this Vessel, may divide equally any Monies which may remain to my account after Payment of the aforesaid sums and my Debts.—*Frank Abney Hastings*, *Perseverance* Steam Vessel, at Sea. June 20th 1826.—The alteration in favour of *J. Hane* and *Nicolo Kalergy*, 8th August 1827. *Karteria Lyra*."

On the 1st of June 1828, the Testator died in the Island of *Zante*, leaving the Plaintiffs, his Mother and Brother, his Next of Kin.

In November 1828, Mr. *Macdowall* proved the first Will, the original of which had been left, by the Testator, with Messrs. *Coutts & Co.* his Bankers. The Probate was afterwards revoked at the Suit of the Defendant *J. Hane*, and Letters of Administration to the Testator, with the second Will annexed, were granted to him.

The Bill insisted that the residue of the Testator's Estate was not disposed of by the second Testamentary Paper, and that the Plaintiffs were entitled to it as his Next of Kin.

"The Bill prayed for the usual Accounts of the Testator's Estate, ['69] Debts, &c.; and that it might be declared that the Plaintiffs were entitled to the clear Residue of his Estate, and that it might be paid over to them according to their respective rights therein.

The Answer stated that the Plaintiffs had contested the Defendant's Right to the Letters of Administration, in the Ecclesiastical Court, on the ground that the Testamentary Paper did not dispose of the Residue, but that it was

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undisposed of and belonged to them as his Next of Kin ; that the Defendant, on the other hand, insisted that the Residue was disposed of by the Testamentary Paper, and that he, as one of the Residuary Legatees named therein, was entitled to the Letters of Administration ; that Sir *J. Nicholl*, the Judge of the Court, decided that the Testamentary Paper, upon the true construction thereof, amounted to a Gift of the Residue to the Defendant, and, on that ground, decreed that the Letters of Administration should be granted to him. The Defendant submitted that that Decision was a Judgment by a Court of competent jurisdiction on the construction of the Will, and that the Judgment not having been appealed from, it was not competent to this Court to question that Decision, or to put, on the dispositions of the Will, a construction different from that which had been put on them by a Court to whose jurisdiction such questions properly belonged.

By the Decree, it was referred to the *Master* to inquire and state whether, on the 20th of June 1826, the 8th of August 1827, and the 1st of June 1828, or at any of those times, the Testator had any and what

[*70] Money-account subsisting between him and any and what Person or Persons. The *Master* found that, on the 20th of June 1826, the 8th of August 1827, and the 1st of June 1828, the Testator had a Money-account subsisting between him and Messrs. *Coutts & Co.* as his Bankers in *England*, and that, on the 8th of August 1827 and the 1st of June 1828, he had also a Money-account subsisting between him and the *Greek* Government, in respect of his Disbursements on account of the Vessel, on which account 1,180*l.* sterling were due to him on the 1st of June 1828 ; and that he had also, on the 1st of June 1828, owing to him from the *Greek* Bank or Commission of Finances, 474*l.*, from *E. Henos*, 100*l.* and from *D. Kalergy*, 118*l.* : but the *Master* did not find that, besides such several Accounts aforesaid, the Testator had, at the respective times aforesaid, any other Money account subsisting between him and any other Person or Persons. It appeared, however, by the State of Facts, that, on the 8th of August 1827 and 1st of June 1828, the Testator was entitled to 4,510 French Five per Cent. Rentes, and 600*l.* Four per Cent. English Stock ; and that the Balances due to the Testator from *Coutts & Co.* on the 20th of June 1826, the 8th of August 1827 and the 1st of June 1828, were, respectively, 92*l.* 7*s.* 6*d.*, 81*l.* 7*s.* 6*d.* and 300*l.* 11*s.* 11*d.*

The Cause now came on for Further Directions.

Sir *E. Sugden*, Mr. *Knight* and Mr. *G. Richards*, for the Plaintiffs.

Mr. *Pepys* and Mr. *Jas. Russell*, for the Defendant, contended that the Bequest to *N. Kalergy* and the Defendant *J. Hane*, was a Residuary Bequest. *Lynn v. Kerridge (a), Kendall*

[*71]

(a) *West's Cases*, temp. *Hardwicke*, 172.

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v. *Kendall*(b). They also relied on the Judgment pronounced by Sir *John Nicholl* as being conclusive.

Sir *E. Sugden*, in reply, referred to *Hotham v. Sutton* (c).

The VICE-CHANCELLOR :

I do not think that I am bound by the Judgment of Sir *John Nicholl*, as I do not know that he had before him the circumstances which are found in the Master's Report.

The question is whether the Testator meant to give the Monies that might remain to his account, or to give the general Residue of his Estate. I do not think that what Lord *Eldon* says in *Hotham v. Sutton*, bears on this Case ; for he there speaks of the effect of the word " Monies," where it is found with other words. At the same time it appears to me that a Case might be put in which the word " Monies" would pass the general Residue (d). The question, however, is whether it passes the Residue in this Case.

Now I am bound, in putting a Construction on this Will, to give effect to every word in it. The Testator has not said that *Hane* and *Kalergy* may divide any Monies which may remain, but any Monies which may remain to his account. He had, at the date of his Will, some account ; when he made the alteration, he had "some account ; and he had, at his [*72] death, some account which was adequate to pay the Legacies, and which, for aught I know, might be adequate to pay his Debts.

I am bound to give a meaning to the words, " to my Account : " and, therefore, I am of opinion that these Parties are not General Residuary Legatees, but are Legatees of the Balance that might remain to the Testator's account, after Payment of his Debts and Legacies.

Declare that *Kalergy* and *Hane* are entitled to the Surplus that may remain due on the Accounts specified in the Report, after payment of the Debts and Legacies.

PIGGOTT v. GREEN.

1833 : 16th March.—*Executor*.—*Legacy*.

A Testatrix gave Legacies of 1000*l.* each, to A, B. and C. ; and, in a subsequent part of her Will, she appointed them her Executors. In the preceding Clauses, she made Devises and Bequests " to her Executors thereafter named," and " to her Executors and Trustees." A neither proved nor acted. Held that he was not entitled to the Legacy.

THE question in this Case was whether an Executor, who had neither

(b) 4 Russ. 360, see 369.

(c) 15 Ves. 319, see 327.

(d) See *Ommanney v. Butcher*, 1 Turn. & Russ. 260.

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proved nor acted, was entitled to a Legacy given to him by the Testatrix in the Cause.

The following are the Clauses of the Will in which the Executors were mentioned.

“ I give and devise all and every my Freehold Messuages, Lands, Tenements and Hereditaments whatsoever, and also my Copyhold Messuages, Lands, Tenements and Hereditaments whatsoever, with their Appurtenances, unto and to the use of my Executors hereinafter mentioned, their Heirs and Assigns, in Trust, &c. &c.

[*73]

“ I give and bequeath unto my said Executors and Trustees, their Executors, Administrators, and Assigns, the Sum of 3,000*l.* of lawful English Money, upon Trust that they my said Trustees, shall and do, &c. &c.

“ I give and bequeath to *Edward Green*, of *Wargrave* aforesaid, Gentleman, *Wm. Fisher*, of *Friday-street, London*, Silk Mercer, and *Robert Lawrence* of *Reading* in the County of *Berks*, Linen Draper, the Sum of 200*l.* Four per Cent. Bank Annuities, upon Trust that they the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, or the Survivor or Survivors of them, his Executors and administrators, do and shall, from time to time, &c. &c.

“ I give and bequeath unto each of them the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, the Sum of 100*l.* I give and bequeath to *A. S. Morgan* the Sum of 100*l.* for her absolute use. Also I give and bequeath unto *Mr. R. Fisher*, of the *Strand*, the Sum of 100*l.* And also to *Mrs. Green*, the Wife of the said *Edward Green*, the Sum of 100*l.*

“ And, as to all the rest, residue and remainder of my Real and Personal Estate and Effects whatsoever and wheresoever, not hereinbefore disposed of, I give, devise and bequeath the same and every part thereof, unto the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, their Heirs, Executors, administrators and Assigns, according to the nature and quality thereof respectively; but, nevertheless, upon Trust that they the said

[*74] “ *Edward Green*, *Wm. Fisher* and *Robert Lawrence*, or the Survivors or Survivor of them, his Heirs, Executors and Administrators, do and shall sell and dispose of and convert the same into Money, &c. &c.

“ And I hereby nominate, constitute and appoint the said *Edward Green*, *Wm. Fisher* and *Robert Lawrence* Executors of this my Will.”

The Defendants, *Green* and *Lawrence*, the acting Executors, paid *Fisher* his Legacy; but the Master, in taking the Accounts directed by the Decree, disallowed that Payment; upon which the Defendants excepted to the Report.

Sir *E. Sugden* and Mr. *Wakefield*, in support of the Exceptions, said

1833.—Freeman v. Simpson.

that the Testatrix, when she gave the Legacies to the Executors, mentioned them by their names. *Cockerell v. Barber* (a).

The *Attorney-General* and Mr. Temple, in support of the Report, said that the Testatrix had united the three Persons, whom she afterwards appointed her Executors, in one Bequest. *Stackpoole v. Howell* (b).

The VICE-CHANCELLOR:

I think that the *Master* is right.

The rule is that, where a Legacy is given to an Executor, *primâ facie*, it is given to him for his trouble; and, if he refuses the office, he is not entitled to it; but if it can be collected, from the whole of the Will, that the Legacy was not given to him in respect of the [*75] Office, then he will be entitled to it.

The Case of *Cockerell v. Barber* affords sufficient special circumstances to show that the general rule did not apply. There I should have thought, from the Testator's using the expression "My Friend and Partner," that it ought to be taken that the Legacy was given to him as a Friend and Partner; and there was no Gift, of the same amount, to all the Executors.

The Testatrix, in this Case, frequently calls these Legatees "her Executors and Trustees;" and she then classes them together, and gives a Legacy, of the same Amount, to each of them. And, on these grounds, I am of opinion that the Executor who did not act, is not entitled to his Legacy; and, consequently, the Exception must be over-ruled.

FREEMAN v. SIMPSON.

1833: 17th March.—*Legacy.—Interest.*

Testator gave a Legacy to his Daughter, and all his Real and Personal Estate to his Wife, and, after her death, he gave his Real Estate, subject to the Legacy, to his Son in fee. The Wife survived the Testator, and afterwards died. Held that the Legacy, with Interest from the end of a Year after the Testator's death, was raiseable out of the Real Estate, in case the Personal Estate was deficient.

THE Testator in this Cause gave a Legacy of 300*l.* to his Daughter; and he devised a Messuage, then in his own occupation, and all other his Real and Personal Estate, to his Wife, for her life; and, after her decease, he gave the Messuage, subject to the payment of and chargeable with the Legacy, to his Son in Fee.

*The Testator died leaving his Wife surviving. She afterwards [*76] died; and, after her death, the Bill was filed by Persons to whom

(a) *Ante*, Vol. 1. p. 23.

(b) 13 Ves. 417.

1833.—*Williams v. Janaway.*

the Legacy had been assigned, alleging that the Testator's Personal Estate was insufficient to pay his Debts, and praying that the Legacy, with Interest from the end of one year after the Testator's death, might be raised by sale of the Messuage.

The question was whether Interest was payable, on the Legacy, from the end of a year after the Testator's death, or from the death of his Widow.

Sir *E. Sugden* and Mr. *Wilbraham*, for the Plaintiff, said that the Legacy was, primarily, a charge on the general Personal Estate, and, therefore, must carry Interest from the end of a year after the Testator's death. *Davies v. Davies* (a).

Mr. *Knight* and Mr. *Shortland*, for the Devisee of the Messuage and Mortgagees under him, said that the Plaintiff could not have claimed the Interest as against the Widow; for the Testator's intention was that she should have all the Real and Personal Estate for her life, and, consequently, that the Legacy could not be payable till her death.

Mr. *Simons*, for the Testator's Personal Representative.

The *Vice-Chancellor* said that the Testator's Personal Estate was, in the first instance, answerable for the Legacy; and, therefore, that it bore Interest from the end of one year after the Testator's death; and, if
[*77] the Personal Estate, was not sufficient to pay the Testator's Debts, the Plaintiffs were entitled to have the Legacy and Interest raised by Sale of the Messuage.

WILLIAMS v. JANAWAY.

1823: 28th March — *Practice.*—*New Orders.*—*Dismissal of Bill.*

The 17th Order of 1831, does not apply except in cases where the Plaintiff requires a Commission: in other cases, the old Practice remains unaltered.

THE Plaintiff filed a Replication before Trinity Term 1832, and, in that Term, he served a Subpœna to rejoin. No step was afterwards taken by the Plaintiff. On the first Seal after Hilary Term 1833, the Defendant moved to dismiss the Bill for want of prosecution. No Notice of Motion to Dismiss had been served before the Replication was filed.

Mr. *Bethell*, for the Motion, referred to the 17th Order of 1831, and said that the old practice in such a case, was that the Defendant should set down the Cause at his own request: that that process was very tedious: for one clear Term must elapse after the Term in which the Cause was put at issue,

(a) *Daniell's Rep.* 84.

 1833.—*Peddie v. Peddie*.

and, in the following Term, the Defendant might give a Rule to produce Witnesses. Then another clear Term must elapse, and, in the following Term, a Rule to pass Publication might be given, and, in the Term following, the Cause might be set down.

The *Vice-Chancellor* held that the 17th Order of 1831, did not apply except in a Case where the Plaintiff wanted a Commission, and had obtained or required an order for a Commission to examine Witnesses, inasmuch as the obligation to give the Rules to produce Witnesses and to pass Publication, and to set down the Cause, was governed by the antecedent words "and *requires a Commission :—" and, consequently, in Cases [*78] like the present, the old practice remained unaltered (a).

PEDDIE v. PEDDIE.

1833: 1st April.—*Construction*.—*Scotch Settlement*.

By a Scotch Settlement, a sum of Stock, was settled on the Husband and Wife for their lives, and, after the death of the Survivor, on their Children, and, failing Children, on the nearest Heirs of the Wife: and she was empowered, at any time in her life, and even on deathbed, to bequeath or dispose of the Stock to any Person and in any Manner she might think proper. Held that the Power was not intended to be available, except in the event of there being a failure of Children of the Marriage.

PREVIOUSLY to the Marriage of the Defendant *J. C. Peddie* with *Eliza Baillie*, both of whom were resident and domiciled in *Scotland*, the following Agreement or Article of Settlement, dated the 9th of Nov. 1825, was entered into between them: "It is contracted, agreed, and matrimonially ended between the Parties following, viz. *John Crofton Peddie*, Lieutenant in his Majesty's 21st Regiment of Foot, on the one part, and Miss *Eliza Baillie*, Daughter of the late *James Baillie*, Esq. on the other part, in manner following, that is to say, the said *John Crofton Peddie* and *Eliza Baillie* have accepted, and do hereby accept of each other for lawful Spouses, and hereby bind and oblige themselves to solemnize their Marriage with all convenient speed agreeably to the rules of the Church. In contemplation of which Marriage, and in consideration of the Settlement after-mentioned, the said *John Crofton Peddie* hereby disposes, assigns, conveys and makes over, to and in favour of himself and the said *Eliza Baillie*, in conjunct Fee and Life Rent, for her Life Rent use, alienably, and to the Child or Children to be born of the intended Marriage, equally among *them, [*79] share and share alike, in Fee, all and sundry his whole Lands,

(a) See *Anon*, ante, Vol. V. p. 497.

1833.—*Peddie v. Peddie.*

Heritages, Debts and Sums of Money, heritable and moveable, lying Money, Goods, Gear, and all other heritable and moveable means and Estate of whatever nature or denomination the same may be resting and pertaining, or shall be resting and pertaining to him at the time of the dissolution of the Marriage, together with all Charters, Dispositions, Adjudications, and heritable and moveable Bonds, Tacks, Contracts, Assignations, Bills, Promissory Notes, and all other Writs and Securities whatsoever heritable and moveable, made and granted, or that shall be made and granted, or which can any ways be interpreted in his favour at the time of the dissolution of the Marriage, with all action, diligence and execution competent, or that may be competent on the Premises, and all that has followed or may follow thereupon. For which causes, and on the other part, the said Miss *Eliza Baillie* hereby disposes, transfers, assigns, conveys and makes over, to and in favour of herself and the said *John Crofton Peddie*, her promised Spouse, in case he shall survive her, in Life Rent, for his Life Rent use, allenerly and to the Child or Children to be born of the intended Marriage, equally among them, share and alike, in Fee; whom all failing, to the said *Eliza Baillie's* own nearest Heirs; declaring always, as it is hereby expressly provided and declared, that the said *Eliza Baillie* shall have full power and liberty, and such full power and liberty is hereby expressly reserved to her, at any time in her life, and even on deathbed, by a Writing under her hand, or by a Will or Settlement, to leave and bequeath, or dispose of the Sum of 6,000*l.*

Three pounds per Cent. Consols hereinafter conveyed in Trust, [*80] and the whole of her means, Estate *and Effects, to any person or persons, and in any way and manner she may think proper, all and the whole Sum of 6,000*l.* *Three per Cent. Consolidated Annuities*, at present standing in the said *Eliza Baillie's* name, but to be transferred into the names of *James Baillie*, Esq. *Charles Johnston*, Captain in the Royal Navy, *Wm. Peddie*, Esq. and *Alex. Hutchinson*, Writer in *Edinburg*, and the Survivors or Survivor of them, in Trust, always, for the said *Eliza Baillie* and *John Crofton Peddie*, and the Child or Children to be born of the intended Marriage, and the other uses and purposes, before and after expressed, with the whole Dividends to become due thereon after the decease of the said Miss *Eliza Baillie* and *John Crofton Peddie*, or the longest liver of them; declaring always that it shall be in the power of the said *James Baillie*, *Charles Johnston*, *William Peddie* and *Alexander Hutchinson*, as Trustees aforesaid, or the Survivor or Survivors of them, on being required so to do in writing by the said *Eliza Baillie* and *John Crofton Peddie*, to sell out of the said 6,000*l.* *Three per Cent. Consols*, any Sum or Sums not exceeding 2,000*l.* sterling, and to apply the same in the purchase of a Commission or Commissions in the Army for the Advancement of the said *John*

1833.—*Peddie v. Peddie.*

Crofton Peddie in his Profession ; but, in the event of the said *John Crofton Peddie* afterwards selling out of the Army the Commission or Commissions so to be acquired by him, he hereby binds and obliges himself to re-invest the said 2,000*l.*, out of the Sums so to be received by him in the Sale of such Commission or Commissions so purchased, in the names of the said Trustees before mentioned, or the Survivors or Survivor of them, for the Purposes aforesaid under the Declarations before written. And the said *John Crofton Peddie* and *Eliza *Baillie* bind and oblige them- [*81] selves, respectively, and the Survivor of them, to alienate, entertain and educate the Child or Children to be born of the intended Marriage, suitably to their Stations : and the said *John Crofton Peddie* hereby nominates and appoints the said *Eliza Baillie*, *James Baillie*, *Charles Johnston*, *William Peddie* and *Alexander Hutchinson*, and the Survivors and Survivor of them, to be Tutors and Curators to the Child or Children to be born of the intended Marriage, during their Minority, with all the Powers conferred on Tutors and Curators by the Law of *Scotland*, declaring that the said Trustees and Tutors and Curators shall not be liable for omissions, but only each of them for their actual Intromissions ; and, farther, it is hereby covenanted and agreed on by both Parties that, although the said Marriage should happen to be dissolved by the death of either Party within the space of one year and a day after the Solemnization thereof, and without a living Child procreated of the same, yet this present Contract and the whole Provisions herein contained in favour of the Husband and Wife respectively, shall subsist and continue in full force in favour of the Survivor, in the same manner as if the Marriage had subsisted for more than a year and day, or a living Child had been procreated of the same, any Law or Custom to the contrary notwithstanding. And it is also hereby agreed that all Action and Execution for implement of the Obligations incumbent on the said *John Crofton Peddie*, shall pass at the instance of the said *James Baillie*, *Charles Johnston*, *William Peddie*, and *Alexander Hutchinson* as Trustees aforesaid, or all of them or either of them. ”

The Marriage was solemnized, in *Scotland*, on the *10th of [*82] November 1825 ; but the Trustees never executed the Articles of Settlement, nor were the 6,000*l.* Consols ever transferred into their names.

After the Marriage, the whole of the Stock, except 2,285*l.* 7*s.* 9*d.*, was sold out, at different times, under Powers of Attorney jointly executed by the Husband and Wife ; and part of the Proceeds was applied in the Purchase of a Captain's Commission for the Husband.

The Bill was filed by the three Infant Children of the Marriage, praying that new Trustees of the Articles might be appointed, that the Stock re-

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maining unsold might be transferred into their names, that the Stock, which had been sold out in breach of the Articles, might be replaced by *J. C. Peddie*, and that, in the mean time, the Dividends might be applied, during his life, in making good so much of the Stock as had been sold out.

After the commencement of the Suit, a Deed-poll, dated the 8th of October 1832, was executed by Mrs. *Peddie*, by which, after reciting the Articles, and the Sales which had been made of the Stock, she, in exercise of the Power reserved to her by the Settlement, appointed both the parts which had been sold out and which remained unsold, to Captain *Peddie*, absolutely. Captain *Peddie*, by his answer, claimed to be entitled to the whole of the Stock, under the Deed-poll, and to have the same benefit thereof as if he had pleaded the same to the Bill.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Sharpe*, for the Plaintiffs, said that the power to dispose of the 6,000*l.* Stock, was intended to take [*83] effect, only in the event of *there being a failure of Children of the Marriage, and that it came in the place of the limitation to the nearest Heirs of Mrs. *Peddie*; and, as there were Children of the Marriage, the Appointment was inoperative.

The *Attorney-general* and Mr. *O. Anderdon*, for the Defendants, said that it was plain, from the language of the Articles, that Mrs. *Peddie* was empowered to dispose of the Stock, at any time, or in any manner, and that Power overrode all the antecedent limitations in the Articles.

The VICE-CHANCELLOR:

I do not understand it to be contended that, by the Law of *Scotland*, there is any settled meaning of the words by which the Power in question is given; and, therefore, I shall construe these Articles in the same manner as I should construe an *English* Settlement, that is, so as to make the whole consistent.

Now the last Power in the Articles, is utterly inconsistent with the notion that the Wife had a general Power to dispose of the whole Fund: and my opinion is that the Power to appoint the 6,000*l.* Stock, cannot be exercised, except in the event of there being a failure of Children of the Marriage.

Declare that the Plaintiffs are entitled to have the sum of 6,000*l.* Stock invested and secured, in the names of Trustees, upon the Trusts of the Articles, subject to the Proviso therein contained: that the Power to appoint the 6,000*l.* Stock, will only become available in the event of failure of Children of the Marriage; that the Appointment made by the Deed-poll of the 8th October *1832, is inoperative: and that the Defendant *J. C. Peddie* is entitled to have the benefit of the Proviso in the Articles mentioned, respecting the purchase of a Commission or Commissions in the Army for his advancement in his Profession. Order [*84]

1833.—*Peddie v. Peddie.*

the Defendants *Peddie* and Wife, to transfer into the name of the Accountant-general, in Trust in this Cause, to an account to be intituled "On the Trusts of the Marriage Articles of the 9th day of November 1825," the sum of 2,285*l.* 7*s.* 9*d.* Bank Three per Cent. Annuities, now standing in the name of the Defendant *Eliza Peddie*, such Sum to be taken as part of the 6,000*l.* like Annuities. Order that the Defendant *J. C. Peddie* do receive the Sum of 68*l.* 11*s.* 2*d.*, the amount of the Dividends which are now due in respect of the 2,285*l.* 7*s.* 9*d.* Stock, and pay the same into the Bank with the privity of the Accountant-general, to be there placed to the credit of the Cause, to an Account to be intituled "The Dividend Account." Order that the same, when so paid in, and all accumulations of Dividends be laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the privity of the accountant-general, in Trust in this Cause, the like Account. Order the Plaintiff's Costs to be taxed, and the amount raised out of the 2,285*l.* 7*s.* 9*d.* Stock. Order that the Dividends to accrue due thereon until such Sale, and on the residue after such Sale, and all accumulations of Dividends, be, from time to time, laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the privity of the said Accountant-general, in Trust in this Cause, to the Account intituled "The Dividend Account." Declare that the Defendant, *J. C. Peddie*, is bound to make good so much of the difference of the 6,000*l.* and 2,285*l.* 7*s.* 9*d.* Stock, "as shall not have been properly applied in the purchase of a Commission or Commissions pursuant to the Articles. Refer it to the *Master* to inquire and state what sum or sums of money have been properly applied in the purchase of such Commission or Commissions, and how much of the Stock sold out was necessary to raise what the *Master* shall find to have been so applied. Order the *Master* to give credit, to the Defendant *J. C. Peddie*, for so much Bank Annuities as he shall find was necessary to be sold for that purpose, and to ascertain and state the amount of the deficiency, and that the Defendant *J. C. Peddie* do transfer, into the name and with the privity of the Accountant-general in Trust in this Cause, to the Account "On the Trusts of the Marriage Articles," so much Bank Three per Cent. Annuities as the *Master* shall certify to be the amount of the deficiency. And, it being alleged, by the Answer of the Defendants *Peddie* and Wife, that the Defendants *James Baillie*, *Charles Johnston*, *William Peddie* and *Alexander Hutchinson*, decline to accept the Trusts of the Articles, and that they are resident out of the Jurisdiction of the Court, declare that proper Persons ought to be appointed Trustees of the Articles in their room.

1833 —Bartram v. Whichcote.

[*86]

*BARTRAM v. WHICHCOTE.

1833 : 1st April.—*Vendor and Purchaser.*—*Title.*—*Power of Sale and Exchange*

The Donces of a Power of Sale and Exchange, may pay Money for Owelty of Exchange, although they are not expressly authorized so to do.

JOHN MANNERS, Esquire, by his Will dated the 13th of September 1791, devised to Trustees and their Heirs, all his Lands and Hereditaments at *Oxbourly*, and also all other Lands and Hereditaments of which he had power to dispose by his Will, in Trust to convey, settle and assure the same, from and after his decease, to the use of his eldest Son, *William Manners*, and his Assigns for life, with remainder to Trustees to preserve contingent Remainders, with remainder to the use of the first and other Sons of *William Manners* successively, in Tail Male, and, for want of such Issue, to the uses thereafter mentioned : and he directed that the Settlement to be made in pursuance of his Will, should contain a Proviso and Declaration that it should be lawful for the Trustees thereof for the time being, at any time or times thereafter, at the request and by the direction of the Person or Persons who, by virtue of the limitations contained in such Settlement, should, for the time being, be entitled to the Rents and Profits of the said Hereditaments, and testified as therein mentioned, to dispose of and convey, either by way of absolute Sale, or in exchange for or in lieu of other Hereditaments to be situate in *England*, all or any part of the Estates so directed to be settled and the Inheritance thereof in Fee Simple, to any Person or Persons whomsoever, for such price or prices in Money, or for such equivalent or recompense in Manors, Lands or Hereditaments, as to the Trustees should seem reasonable ; and that, for the purpose of effectuating such Dispositions or Conveyances, but not for any other purpose, it should be lawful for

[*87] the Trustees, with such consent and approbation as therein mentioned, by any Deed or Deeds, to be executed and attested as therein mentioned, to revoke, determine and make void all and every, or any of the Uses, Trusts, Powers and Provisoes in and by such Settlement to be limited, declared and expressed of or concerning the Estates therein to be comprised or any part thereof, and, by the same or any other Deeds or Deed, Instruments or Instrument in writing, to limit, declare, direct, or appoint any Use or Uses, Estate or Estates, Trust or Trusts of the same Estates, or any part or parts thereof, which it should be thought necessary or expedient to limit, declare, direct or appoint in order to effectuate such Sales, Dispositions and Conveyances ; and also a Clause, Agreement or declaration that the Trustees should settle and assure, or cause to be settled and assured, as well the Hereditaments so to be purchased, as the Hereditaments to be

1833.—*Bartram v. Whitecote*.

received in exchange, to, upon and for the same uses, trusts and purposes, and with, under and subject to the same Powers, Provisoos, Conditions and Agreements as were thereby directed to be limited, expressed, declared and contained of and concerning such of the Hereditaments to be comprised in such Settlement, which should be so sold or given in exchange.

The Testator died in 1792.

By Indentures of Lease and Release of the 8th and 9th of April 1793, *William Manners*, who had then become *Sir William Manners*, Bart., ratified and confirmed his Father's Will, in order to avoid the expense of proving it in Chancery; and he and the Trustees made a settlement of the devised Estates, conformable, in every respect, to the directions of the Will.

*One of the Trustees having died, *Charles Butler*, Esq. was ['88] appointed a Trustee in his place.

In April 1824, the Trustees, at *Sir W. Manners's* request, agreed with *Robert Bartram*, that the *Osbournly* Estate should be appointed and released to him in exchange for certain Lands at *Buckminster* and *Sawston*, in *Leicestershire*, of which he was seised in Fee, and for 500*l.* to be paid to him, by the Trustees, out of the Monies in their hands under the Trusts of the Will, for equality of exchange. And, accordingly, by Lease and Release, of the 21st and 22d of January 1828, *Bartram* conveyed his Lands at *Buckminster* and *Sawston*, to such uses, upon such Trusts, for such intents and purposes, and with, under and subject to such Powers, Provisoos, Conditions and Agreements to, upon, for, or with, under and subject to which the same ought, as Hereditaments received in exchange under an exercise of the Power of Exchange contained in the Will of *John Manners* and the Indenture of the 9th of April 1793, to stand and be limited and settled, in exchange for the said Premises agreed to be exchanged for the same: and the Release contained a Proviso, that if *Bartram*, his Heirs, or Assigns, should, without his or their default, be evicted from or disturbed in the possession of the Premises intended to be appointed and conveyed in exchange, it should be lawful for him and them to enter into the Hereditaments and Premises thereby conveyed in exchange, and that the same Hereditaments and Premises should, thenceforth, be to the same uses as if the now stating Indentures had not been made.

Bartram, by his Will dated the 14th of January 1828, after reciting the Agreement with the Trustees, *devised all his Lands, ['89] Tenements and Hereditaments situate at *Buckminster* and *Sawston*, and also the Farm, Lands and Hereditaments situate at *Osbournly* agreed to be taken by him in exchange from the Trustees, to the Plaintiffs in Fee, in Trust to perform the Agreement, and, for that purpose, he directed that

1833.—*Bartram v. Whichcote*.

the Plaintiffs should convey and assure the Hereditaments and Estates situate at *Sweston* and *Buckminster*, to the Trustees of the Settlement, in exchange for the Hereditaments and Estate situate at *Osbournly*, and that the lastmentioned Hereditaments and Estate situate at *Osbournly*, should be conveyed to the Plaintiffs their Heirs and Assigns, and that the same should be subject to the same Trusts as he should therein declare as to his Hereditaments and Real and Personal Estates; and, he directed that his Trustees should, as and when they should think proper and convenient after his decease, absolutely sell and dispose of his said Hereditaments and Real Estates, and collect, get in and convert into Money his Personal Estate, and dispose of the Money to arise therefrom in manner therein mentioned.

Bartram died on the 29th of March 1828.

By Lease and Release and Appointment of the 1st and 2d of September 1828, after reciting that the Plaintiffs had, in exercise of the Trusts reposed in them by *Bartram's* Will, and for carrying into effect the exchange, required the Trustees of the Settlement to convey the *Osbournly* Estate, and to pay 500*l.*, agreed to be paid by way of equality of exchange, to them, and that, in pursuance of the Agreement for the exchange, *Charles Butler*

had paid to the Plaintiff *C. Bartram*, out of the Trust-monies in [*90] his hands, the sum of 500*l.*, "by way of equality of exchange; the

Estate at *Osbournly* was appointed and conveyed by the Trustees of the Settlement, and by Sir *W. Manners*, to the Plaintiffs in Fee, upon and for the Trusts and purposes declared by *Bartram's* Will.

On the 29th of November 1830, the Plaintiffs, in performance of their Trusts, agreed, with the Defendant, to sell to him part of their Testator's Estates, including the Estate at *Osbournly*, for 12,500*l.*

The Defendant having refused to perform his Agreement, the Bill was filed to compel a Specific Performance.

The Defendant, in his Answer, said that he had no objection to the Plaintiffs' title, except that the exchange made by *R. Bartram* with the Trustees of the Settlement, and so carried into effect as before mentioned was not good and valid, and, therefore, the Plaintiffs had no Title to the *Osbournly* Estate: that the grounds upon which he insisted that the exchange was not valid, and had not been legally and effectually carried into effect, were that the power of exchange did not authorize the gift of any Money for equality of exchange, and that the Exchange was made with *Robert Bartram*, and that he performed his part of it, while the exchange, or the conveyance to perfect it, was made to the Trustees of his Will: that an Exchange, to be valid, ought to be completed by and between the same Persons or Parties, and not by one Party and the Representatives of the other Party: that he was satisfied with the Title, except in respect of the question so raised by him

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as to the validity of the exchange. And he submitted that the
 *Exchange was, under the circumstances before mentioned, not au- [*91]
 thorized, and that it had not been legally and effectually carried in-
 to effect; and that the Plaintiffs had not a good Title to the *Osbournly*
 Estate.

Sir *E. Sugden* and Mr. *Barber*, for the Plaintiffs:

The Purchaser objects to complete his purchase, on the ground that the Trustees of the Settlement of April 1793, (though they had a Power of Sale and Exchange) had no power to give money for owelty of exchange.

Two Estates exactly of equal values, can never be met with, and, therefore, it is incident to the Power, to receive Money for owelty of exchange. By the Common Law, Money may be received for owelty of partition. The Trustees who paid the 500*l.*, had a Power of Sale: that Sum, therefore, must have arisen from the Sale of part of the settled Estates. *Doe v. Preston* (a).

Mr. *Preston* and Mr. *Lynch*, for the Defendant:

This is quite a novel Case, both in point of practice and of decision. The transaction was partly a purchase, and partly in exchange. Powers must be strictly pursued; and the Parties in whom a Power is vested, can do only what the Power authorizes. Here the Trustees of the Settlement, were not authorized to pay any Money for owelty of exchange.

Under an exchange, each Party must have a right of re-entry on eviction: but, in this Case, if eviction takes place, the whole 500*l.* will be lost.

**Bartram* died before the transaction was completed; and, if an [*92]
 exchange is not perfected in the lifetime of both Parties, it is void (b).

The VICE-CHANCELLOR:

There is no objection to this transaction in principle.

The exchange in this case, was not an exchange at Common Law, nor is it subject to the same rules.

The remedies which the Parties have in case of eviction, are not the same as the Common Law gives, but are provided by the Covenants in their Conveyances. If either of the Parties to an exchange at Common Law, aliens the Land taken by him in exchange, his right of re-entry is destroyed (c).

No analogy, therefore, exists between a transaction like the present, and an exchange at Common Law; and the fact that Mr. *Bartram* died before the Conveyance to him was executed, does not affect the Case.

As the 500*l.* has been paid, and the Lands have been conveyed to his Trustees, I am of opinion that they have a good Title, and, consequently, the Purchaser is bound to complete his purchase.

(a) 7 B. & Cress. 392.

(b) Co. Lit. 50 b.

(c) *Bustard's Case*, 4 Co. Rep. 121.

1833.—Gardner v. Hatton.

['93]

*GARDNER v. HATTON.

1833: 2d April.—*Specific Legacy.—Ademption.*

Testator bequeathed 7000*l.* secured on Mortgage of an Estate at *W.* belonging to *R. T.* The 7,000*l.* and interest were received after the date of the Will, by the Testator's Agent, on his account, and, immediately afterwards, 6,000*l.* part of it, was invested on another Mortgage and the remainder was paid into a Bank in which the Testator had no other Monies, but was afterwards drawn out by a Person to whom the Testator had given a Cheque for the Amount. Held that the Legacy was specific, and, notwithstanding the 6,000*l.* remainder due on the second Mortgage at the Testator's death, that the Legacy was wholly adeemed.

PHILIP GARDNER, by his Will dated the 9th of September 1822, devised certain Real Estates to his Son, *Philip Thomas Gardner*, (the Plaintiff) for his life, and then expressed himself as follows: "Also I give and devise the Interest of the Sum of 26,183*l.* 10*s.* 2*d.* Stock, standing in my name in the Three per Cent. Consols, also I give and devise the Interest of 7,000*l.* secured on Mortgage of an Estate at *Worstead*, in the county of *Norfolk*, belonging to Mr. *Robert Tuck*, also I give and devise the Interest of 6,000*l.* now secured on Mortgage of an Estate at *Conway* in the County of *Carnarvon*, belonging to the late *Holland Williams*, Esquire, also I give and devise the Interest of 6,000*l.* now secured on Mortgage of an Estate at *Carreglwyd* in the Isle of *Anglesey*, belonging to *Holland Griffith*, Esquire, during the term of his natural life, then, with the Interest of 1,100*l.* now secured on Mortgage of an Estate at *Berthlwyd* in the County of *Merioneth*, belonging to Miss *Ellen Evans*, together with those devised above to my Son *Philip Thomas Gardner* during the term of his life, to the use of *Charles Madryll*, Esquire, and the Rev. *Charles William Burrell*, in Trust, after his death, to go with the Estate to the first born Son of the body of my Son lawfully begotten, and to the Heirs Male of the body of such Son lawfully begotten, and, in default of such Issue Male of such Son, to the first, second, or third, and all and every the other "Son or Sons of the body of my said Son lawfully begotten." And, after making several other Bequests, the Testator gave to the Plaintiff, his Watch and Golden Chain, together with all the Remainder and Residue to be considered as undisposed of and go to him.

The Testator died on the 10th of September 1826.

The Bill prayed that it might be declared that the Bequest of the 7,000*l.* secured on Mortgage, &c. was specific, and was adeemed by the Testator calling in and receiving the same after the date and publication of his Will.

The Decree referred it to the *Master* to inquire and state whether the sum of 7,000*l.* secured on Mortgage as in the Pleadings mentioned, was

1833.—Gardner v. Hatton.

paid off in the Testator's lifetime, and now and to whom and in what manner the same was disposed of, with liberty to state special circumstances.

The *Master's* Report set forth an Affidavit made by *C. Pemberton*, of *Cambridge*, Gentleman, who deposed that the Testator's Personal Estate, at the time of making his Will, consisted, in part, of a Mortgage-debt of 7,000*l.* secured as mentioned in the Will: that, on or about the 17th of October 1825, the whole of the Principal, together with an arrear of Interest amounting to 340*l.* 14*s.* 7*d.*, was paid off by *Tuck*, and received by the Testator's Solicitor on his behalf, after the Testator had executed the Re-conveyance of the Mortgage; and that, immediately afterwards, 6,000*l.*, part of the Money paid off, was invested, by the Testator's Solicitor, on another Mortgage, dated the 18th and 19th of October 1825, of [*95] a Freehold and Copyhold Estate at *Hardwicke* in *Cambridgeshire*, belonging to *William Royston*, on which Security the 6,000*l.* had ever since continued: that, on or about the 17th of October 1825, the Testator opened an Account with Messrs. *Mortlock & Sons*, Bankers at *Cambridge*, on which day the residue of the first mentioned Mortgage-debt, amounting to 1,340*l.* 14*s.* 7*d.*, was paid by the Testator's Solicitor into the hands of Messrs. *Mortlocks*, and was by them placed to the Testator's credit; that, on or about the 7th of December 1825, the Testator drew out the sum of 1,340*l.* 14*s.* 7*d.*, by a Check payable to one *C. Hare*, who was the managing articled Clerk and Son-in-law of the Testator's Attorney, and that the same Sum was placed to *Hare's* Credit with the said Bankers, on or about the same 7th of December 1825: that no other sums were entered, either to the debit or to the credit of the Testator with the said Bankers, on or between the 17th of October and the 7th of December 1825; that no security was taken, by the Testator from *Hare*, for the 1,340*l.* 14*s.* 7*d.*, nor was any consideration paid or given for the same: that, in or about Trinity Term 1829, the Testator's Executrix commenced an action against *Hare*, for recovery of the 1,340*l.* 14*s.* 7*d.*, which she was informed *Hare* had never accounted for, but the action abated by his death, and his Widow proved his Will and carried with her the whole of his Property to *America*: that no direction, to the Deponent's knowledge, was given by the Testator that the 6,000*l.* so laid out as aforesaid, was to be in substitution of the Mortgage paid off by *Tuck*, and which had been bequeathed by the Will. The *Master* certified that, upon consideration of the matters aforesaid, he found that the 7,000*l.* secured to the Testator, &c., was *paid off in his [*96] lifetime, and that the Principal and Interest were received by his Solicitor on his account; and that, subsequently thereto, 6,000*l.*, part thereof, was invested by the Testator's Solicitor as before mentioned, and was still

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due and owing, and that the Residue, amounting to 1,340*l.* 14*s.* 7*d.*, was received and retained by *Hare*, and was still due from his Estate.

Sir E. Sugden and *Mr. Bethell* for the Plaintiff, said that the Bequest of the 7,000*l.*, as well as the Bequests that preceded and followed it, was clearly specific: and that the only question was whether the specific Money had been re-invested: that the Testator had not laid the Money by, for the Legatee, but dealt with it as a general Fund: that he had laid out part, and dealt with the rest as part of his general Assets. *Fryer v. Morris* (a); *Barker v. Rayner* (b).

Mr. Treslove and *Mr. Ching*, for the Defendant:

This is a demonstrative Legacy. The Testator gives the Interest of the 7,000*l.*, not as a specific Legacy, but as a Sum then out on Mortgage. He meant to give the Interest of the 7,000*l.*, wherever it might be found at his death. The Money was not received by the Testator, but by his Solicitor, on his behalf.

Supposing the Bequest to be specific, it appears, from the manner in which the Testator disposed of the Money, that he intended to preserve it for the Legatee. The 6,000*l.* was laid out immediately after the first

Mortgage was paid off: the dates of the Deeds show that it [*97] was all one transaction. The second Security* was provided before the Money was received; and the 1,340*l.* 14*s.* 7*d.* was paid to a Banker in whose hands the Testator had no other money. *Coleman v. Coleman* (c); *Chaworth v. Beech* (d); *Le Grice v. Finch* (e); *Barker v. Rayner* (f); *Ashburner v. Macguire* (g); *Gillaume v. Adderley* (h); *Hambling v. Lister* (i). Swinb. 526, Godolphin, 324.

The VICE-CHANCELLOR:

This is a plain Case.

In *Ashburner v. Macguire*, Lord *Thurlow* held that the Legacy was clearly specific, and that it was adeemed to the extent of the Dividend which had been received by the Testator under the Commission; and all that he decreed was that the Bond should be delivered up to the Wife and Children, in order that they might receive the Dividend not received by the Testator, and whatsoever might thereafter be payable, out of the Bankrupt's Estate, in respect of the Debt. But he did not direct that the Legatees should be recompensed out of the general Assets of the Testator.

In *Le Grice v. Finch*, the Master of the Rolls puts it thus, that the Sum given was so described in the Will, that it was a matter of indifference whether it remained out on Mortgage at the time of the Testatrix's death,

(a) 9 Ves. 360.

(c) 2 Ves. c39.

(f) 2 Russ. 122, on appeal. Vol. VI.

(h) 15 Ves. 384.

(b) 5 Madd. 203.

(d) 4 Ves. 555.

(g) 2 Bro. C. C. 105, see III.

(i) Amb. 401.

(e) 3 Mer. 50.

1833.—Weigall v. Brome.

or not, and, therefore, the circumstances of calling it in did not affect the Gift.

*In *Barker v. Rayner*, no Person could doubt that the Policies ['98] were specifically given.

The Cases cited for the Defendant, do not, as it seems to me, affect the present question: and I cannot entertain a doubt, seeing how the Testator has placed this Bequest, that it is as much a specific Gift, as the Gift of the Dividends of the Sum of Stock.

I must take it that every thing was done with the knowledge of the Testator. He executed the Re-conveyance to the Mortgagor; and the 6,000*l.* was laid out on a new Security, given by a new Person; so that a new Debt was constituted; and then he gave a Cheque for the 1,340*l.* 14*s.* 7*d.* to *Hare*.

My Opinion is that, when the Testator received the whole of the Debt, there was an end of the subject, and, consequently, that this is a clear Case of Ademption.

*WEIGALL v. BROME.

['99]

1833: 16th and 18th April.—*Will.—Construction.—Leaseholds for Lives.*

A Testator, seised of Freeholds and Copyholds in Fee, and Leaseholds for Lives, devised "all his Real Estate whatsoever and wheresoever." Held that the Copyholds and Leaseholds for Lives, as well as the Freeholds in Fee, passed, notwithstanding some parts of the Will were inapplicable to them.

Testator gave to his Son, in case he should live to attain 21, such part of his Real Estate as his Son should choose, but not exceeding the yearly value of 350*l.*, and, to his Daughter, such part of his Real Estate as should remain after his Son should have made his choice, or of the whole of his Real Estate in case his Son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.* Held that the Son was entitled to priority of choice, on attaining 21, and that there was to be no apportionment, although he might not leave for the Daughter Lands of the yearly value of 360*l.*

Annuity.—Testator gave an Annuity, payable half-yearly, to his Son for his Maintenance and Education until he attained 21, and another Annuity, payable in like manner, to his Daughter, (who was adult) during the Son's minority. Held that, as the Son was entitled to a proportional part of his Annuity, from the last half-yearly day of payment up to his attaining 21, the Daughter was entitled to a like proportional part of her Annuity.

CHARLES BROME made his Will, dated the 18th of December 1828, as follows: "I give and devise, unto Sir *Charles Saxton*, Bart. all my Real Estate whatsoever and wheresoever, to hold the same unto and to the use of the said Sir *Charles Saxton* and his Heirs, until my Son, *Charles John Bythesea Brome* shall attain the age of 21 years, or shall depart this life under that age, upon Trust to receive the Rents and Profits thereof, and,

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thereout, to pay and apply the yearly Sum of 400*l.*, or so much thereof as he shall, in his discretion, think proper, for the Maintenance and Education of my said Son *Charles John Bythesea Brome* until he shall attain the age of 21 years, and to lay out the Surplus of such 400*l.* a year, if [*100] any, in the purchase of Bank Annuities, in his own Name, to accumulate for the benefit of my said Son *Charles John Bythesea Brome*; and I will and direct the same Bank Annuities to be transferred to my said Son upon his attaining the said age of 21 years: but, in case he shall depart this life under the said age, then I direct that the same Bank Annuities, and all accumulations thereof shall fall into the Residue of my Personal Estate and be disposed of accordingly: And upon further Trust, with and out of the remainder of the said Rents and Profits, to pay to my Daughter, *Cecilia Bythesea Brome*, such Sum of Money, yearly, as with the Dividends and Interest of the Sums of 833*l.* 6*s.* 8*d.* Bank Three-and-a-Half per Cent. Annuities, and 663*l.* 8*s.* 4*d.* Bank Three per Cent. Reduced Annuities to which she became entitled, upon her attaining the age of 21 years, under the Will of her late Mother, and which was transferred to her accordingly, will make up to her the clear annual Sum of 400*l.*, payable half-yearly on the 25th day of March, and 29th day of September in every year, during the Minority of my said Son, the first half-yearly payment to be made on such of those days as shall first happen after my decease; and, as to all the Residue of the Rents, Issues and Profits of my said Real Estate until my said Son shall attain the age of 21 years or until his death under that age, I direct that my said Trustee shall stand possessed thereof upon the same or the like Trusts as are hereinafter declared and contained with respect to the Residue of my Personal Estate. And, in case my son *Charles John Bythesea Brome* shall live to attain the age of 21 years, then I give, devise and bequeath unto my said Son *Charles John Bythesea Brome*, all my Freehold Estate situate at *Croom's Hill Greenwich*, in the County of *Kent*, to hold the same unto and to the use of my [*101] *said Son, his Heirs and Assigns for ever. I also give and devise, unto my said Son, so much and such part of my other Real Estate as my said Son shall choose, but not exceeding, by the yearly Rents and Profits thereof, the yearly value of 350*l.*, to hold such part of my said Real Estate as shall be so chosen by him as aforesaid, unto and to the use of my said Son and his Assigns, for his life, without Impeachment of Waste; and, from and after the determination of that Estate in his lifetime, to the use of the said Sir *Charles Saxton* and his Heirs, during the natural life of my said Son, upon Trust to preserve, &c.; and, from and immediately after his decease, I give and devise the same Hereditaments and Premises unto and to the use of all and every the Children of my said

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Son lawfully to be begotten, equally to be divided between them as Tenants in Common, and the Heirs of their respective Bodies lawfully issuing; and, in case there shall be a failure of Issue of the Body or Bodies of any such Children, then, as to the Part or Share, Parts or Shares, as well original as accruing, of him, her or them whose Issue shall so fail, to the use of the Survivors or Survivor of such Children, equally to be divided between them (if more than one) as Tenants in Common, and to the Heirs of their respective Bodies; and, in default of such Issue, then, as to one Moiety of the said Hereditaments so to be chosen by my said Son as aforesaid, to the same uses, and upon the same Trusts, for the Benefit of my Daughter *Mary Agnes Bythesea*, now the Wife of *Samuel William Bythesea*, and her Child or Children, as are declared with respect to certain Messuages or Tenements and Hereditaments in *Fleet-street* and *Johnson's-court* in the City of *London*, by the Settlement made previous to her Marriage *with the said *Samuel William Bythesea*, or such of them [*102] as shall be then existing or capable of taking effect; and, as to the other Moiety of the said Hereditaments, I give and devise the same unto my said Trustee and his Heirs, the same or the like uses as are hereinafter mentioned with respect to such part of the remainder of my said Real Estate as shall be chosen by my said Daughter *Cecilia Bythesea Brome* as hereinafter mentioned: and I hereby direct that, from and after my said Son *Charles John Bythesea Brome* shall attain the age of 21 years, and shall have made his election as aforesaid, or from and after his decease, in case he shall happen to depart this life without having attained his said age of 21 years, then, I give and devise unto my said Daughter *Cecilia Bythesea Brome*, so much and such part of my said Real Estate as shall remain after my said Son shall have made his choice, or of the whole of my said Real Estate in case my said Son shall not live to choose his part, as she, my said Daughter, shall choose, but also not exceeding, by the yearly Rents and Profits therefore the yearly Value of 360*l.*, to hold the said Hereditaments so to be chosen by her as aforesaid, unto and to the use of my said Daughter *Cecilia Bythesea Brome* and her Assigns, for her life, without Impeachment of Waste; and, from and after the determination of that Estate by any means whatsoever in her life-time, to the use of the said Sir *Charles Saxton* and his Heirs, during the life of my said Daughter, upon Trust to preserve, &c.; and, from and after her decease, to the like uses for the benefit of her Child or Children lawfully begotten, and with the like Remainders over for the Benefit of the Survivors or Survivor of them as are hereinbefore limited for the Benefit of the Child or Children *of my said Son *Charles John Bythesea Brome*; and, in default [*103] of such Issue, then, as to one Moiety of the said Hereditaments

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and Premises, to the same uses as are hereinbefore declared as to the Hereditaments given and devised unto my said Son, *Charles John Bythesea Brome*, and his Child and Children, and with the like Remainders over on failure of such Issue; and, as to the remaining Moiety or Half-part, to the same uses and upon the same Trusts for the Benefit of my said Daughter *Mary Agnes Bythesea* as are declared, with respect to the said Messuages or Tenements and Hereditaments in *Fleet-street* and *John's-court*, by the said Indenture of Settlement: and I hereby authorize and empower the said *Sir Charles Saxton*, his Executors or Administrators, during the Minority of my said Son *Charles John Bythesea Brome*, and from and after he shall attain the age of 21 years, then I authorize and empower my said Son and my said Daughter, during their respective lives and the said *Samuel William Bythesea* and *Mary Agnes Bythesea* his Wife, when they shall be in possession of the said Hereditaments and Premises hereinbefore devised to them respectively, to make any Lease or Leases, or to join in making any Lease or Leases of any part or parts of the said Hereditaments and Premises, for any term or number of years not exceeding 14 years, so as upon every such Lease there be reserved the most improved yearly Rent that can be reasonably obtained for the same, payable half-yearly or quarterly, without taking any Fine for granting the same, and so as in every such Lease there be contained a Clause for re-entry in case of non-payment of the Rent or non-performance of any of the Covenants therein contained; and so as the Tenant or Tenants of such Lease or Leases do execute counterparts thereof respectively. And, as to all the Residue of my Real Estates whatsoever, and wheresoever, after answering the purposes aforesaid, I give and devise the same unto the said *Sir Charles Saxton*, his Heirs and Assigns, upon Trust that he the said *Sir Charles Saxton*, or his Heirs, do and shall, as soon as conveniently may be after my said Son shall have attained his said age of 21 years, or after his decease in case he shall die under that age, sell and dispose of the same, together or in parcels, for the best price or prices that can be got for the same: and, for facilitating such Sale, I do hereby declare that the Receipt or Receipts of my said Trustees for the Purchase-money, shall be a good and sufficient Discharge &c.; and do and shall lay out and invest the Money arising from such Sale or Sales, in the purchase of Bank Three per Cent. Consolidated or reduced Annuities, in the names of my Executor and Executrix, upon the Trusts hereinafter mentioned respecting the Residue of my Personal Estate. And, as to all the rest, residue and remainder of my Money, Money in the Public Funds, Securities for Money, Mortgages in Fee and for years, and the Hereditaments and Premises therein comprised for all my Estate, Right and Interest therein, Goods and Chattels and Per-

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sonal Estate whatsoever and wheresoever, after payment of my Debts, Funeral and Testamentary Expenses, I give and Bequeath the same unto the said Sir *Charles Saxton* and my said Daughter *Cecilia Bythesea Brome*, their Executors and Administrators, upon Trust to call in and receive all such part or parts of my said Personal Estate as shall not, at the time of my death, consist of Money in the Public Funds, and to lay out and invest the same in Bank Three per Cent. Consolidated or Reduced Annuities, in their own names, and to stand possessed of such An- [*105] nuities when purchased, and of all other my Personal Estate, upon Trust to transfer one Third Part thereof unto my said Son *Charles John Bythesea Brome*, upon his attaining the age of 21 years, and, until he shall attain that age, upon Trust to receive the Dividends and Interest thereof, and to apply the same or so much thereof as they shall think proper for the Maintenance and Education of my said Son during his Minority, and to lay out the Surplus thereof (if any) in the purchase of other Bank Annuities, to accumulate for the benefit of the Person or Persons who may eventually become entitled to the Capital from whence such Surplus shall have arisen: and in case my said Son shall depart this life under the age of 21 years, then upon Trust to transfer one Moiety of the said Third Part of the said Residue of my Estate, unto the Trustees of the said Settlement made on the Marriage of my said Daughter *Mary Agnes Bythesea*, upon Trusts therein mentioned concerning the Sums of 833*l.* 6*s.* 8*d.* Bank Three-and-a-Half per Cent. Annuities and 663*l.* 8*s.* 4*d.* Bank Three per Cent. Reduced Annuities therein comprized, and upon Trust to transfer the other Moiety of the said Third Part of the said Residue of my Estate, unto my Daughter *Cecilia Bythesea Brome*, her Executors, administrators and Assigns, for her own use and benefit; and, as to one other Third Part of the said Residue of my estate, upon Trust to transfer the same unto my said Daughter *Cecilia Bythesea Brome*, her Executors, Administrators and Assigns, for her own use and benefit: and, as to the remaining Third Part of the said Residue of my estate, upon Trust to transfer the same unto the said Trustees of the said Settlement made on the Marriage of my said [*106] Daughter *Mary Agnes Bythesea Brome*, to be held by them upon the same Trusts as are therein mentioned as to the said several Sums of Bank Annuities hereinbefore mentioned. And I appoint the said Sir *Charles Saxton* and my Daughter *Cecilia Bythesea Brome* Executor and Executrix of this my Will."

The Testator died on the 26th of April 1830, leaving *C. J. Bythesea Brome* his eldest Son, his Heir-at-Law and Customary and Gavelkind Heir, and his two Daughters named in his Will, him surviving. *Cecilia Bythesea Brome* afterwards married the Plaintiff *E. Weigall*.

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The Testator at his death was seised of a Freehold Estate at *Croom's Hill, Greenwich*, of the yearly value of 87*l.*, of Freehold Estates of Inheritance, exclusive of the *Croom's Hill* Estate, of the yearly value of 446*l.* of Leasehold Estates for Lives, perpetually renewable by Custom, held under Leases granted by the Bishop of *London*, of the yearly value of 128*l.*, of Copyholds of Inheritance, of the yearly value of 136*l.*, and of a Leasehold Estate for years, perpetually renewable by Custom, of the yearly value of 19*l.*, being, exclusive of the *Croom's Hill* Estate, of the yearly value of 729*l.* in the whole.

C. J. B. Brome attained 21 on the 22d of September 1832; and Sir *Charles Saxton* had paid to him or applied for his use, 800*l.* on account of the allowance of 400*l.* a year for his maintenance and education during his minority.

[*107] On the 10th of October 1832, *C. J. B. Brome* served *Sir *Charles Saxton* with a written Notice, stating that, under the authority given to him by the Will of his late Father, he elected to take, as his portion of the Estates therein comprised, the parts therein specified of the Freeholds and Copyholds of Inheritance and Leaseholds for Lives, and which were then let at the yearly rent of 350*l.*

The Bill was filed by Mr. and Mrs. *Weigall* against **C. J. B. Brome*, Mr. and Mrs. *Bythesea*, Sir *C. Saxton* and others, stating that the Plaintiff, Mrs. *Weigall*, was entitled, out of the Rents of the Real Estates, after applying the 400*l.* a year for the Maintenance and Education of *C. J. B. Brome*, to have made up to her the difference between the Amount of the Dividends of the two Sums of Stock and 400*l.* a year, during the *Minority* of *C. J. B. Brome*: that *C. J. B. Brome* had acted upon the Election contained in the Notice, by dealing, as Owner, with some of the Estates comprised therein: that there had been variations in the Annual Value of the Estates at the respective times of the Testator's death, *C. J. B. Brome* attaining 21, and of his making his Election; and that doubts had arisen as to the time when the value of the Estates ought to be taken, in regard to the Election given by the Will to *C. J. B. Brome*, and also as to what Estates passed by the Will, and the periods during which the Annuities ought to be paid, and as to whether *C. J. B. Brome*, first, and Mrs. *Weigall*, afterwards, in selecting Estates of the annual value of 350*l.* and 360*l.*, ought to have regard to the Annual Value thereof at the death of the Testator, at the time when *C.*

J. B. Brome attained 21, or at the time of making such selection.

[*108] *The Bill prayed that the Will might be established and the Trusts performed; and that it might be declared which of the Testator's Estates passed by his Will; and that an Account might be taken of what accrued due, during *C. J. B. Brome's* Minority, in respect of the

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400*l.* a year, and of the Sum which would, with the Dividends of the two Sums of Stock, make the Annal Sum of 400*l.*, and that what should be found due on those Accounts, might be paid to *C. J. B. Brome* and *Mrs. Weigall* respectively, out of the Rents received by *Sir C. Saxton*; and that it might be declared that *C. J. B. Brome* had made his Election as to the parts of the Estates which he was entitled to select, and that *Mrs. Weigall* might be at liberty to select, out of the remainder, Estates of the Annual Value of 360*l.*

C. J. B. Brome, by his Answer, submitted that the Testator's Copyhold Estates, Leaseholds for Lives, and Leaseholds for Years, were not Real Estates according to the true construction of the Will, and did not pass thereby: he admitted that the Estates were, at the Testator's death, of the Annual Value of 729*l.*, but that the Rents had been since reduced: he submitted that he was entitled to a proportionate part of the 400*l.* a year, for the time between the 26th of April 1832 and the 22d of September in the same year, when he attained 21; and he submitted that, if the Notice included any Estates not well devised, he ought not to be concluded thereby, and he denied that he had dealt, as Owner, with any of the Estates comprised therein, otherwise than by agreeing to let one of those Estates for 14 years, and by receiving some of the Rents.

Sir E. Sugden and *Mr. Knight*, for the Plaintiffs:

The questions in this Case are 1st, what passed by "the devise [*109] of the Testator's Real Estates: 2d, how long the Annuity to *Mrs. Weigall* ought to be paid: and 3d, at what time the Property ought be valued.

1st. No one disputes that the Freeholds of Inheritance pass; and there can be no doubt that the Copyholds and the Leaseholds for Lives will pass by the words "my other Real Estate." *Doe v. Ludlam* (a), *Fitzroy v. Howard* (b). In *Sheffield v. Lord Mulgrave* (c), the Judges held that the words "Real Estate," would include Leaseholds for Lives, unless a contrary intention appeared from the context.

The only question is as to the Leaseholds for Years. Now it is apparent, on the face of the Will, that the Testator intended to pass all his Lands. The Residuary Clause does not seem to be intended to apply to the Leaseholds; for the Testator directs the Residue to be sold; and, as the Leaseholds lie intermixed with his other Estates, he could not intend that Clause to apply to them. These Leaseholds are Real Estate, although the Testator had only a chattel interest in them.

(a) 7 Bing. 275.

(b) 3 Russ. 225.

(c) 5 T. R. 571.

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2d. Mrs. *Weigall's* Annuity was intended to be given in the same way as that provided for the Son; and his Annuity, being for his Maintenance and Education, would, certainly, be payable for the time between the last half-yearly day of payment and his attaining 21. The Testator must have meant that the Annuities given to his two unmarried Children, should continue payable, until the division of his Property should take place, when they would be otherwise provided for.

[*110] *3d. The period at which the Property ought to be valued, is the death of the Testator.—In making a Will, a person always looks to the then value of his Property, especially in such a case as this, where the intention of the Testator seems to be to make a fair Division of his Property. The longer the period is postponed, the more uncertain must be the Division.—By the terms of the Will, it is evident that the Testator contemplated that there would be Estates to the amount of 350*l.* a year for the Son, and to the amount of 360*l.* for the Daughter, and, if there should be found not to be sufficient for both, there must be an Apportionment.

Mr. *Barber* for the Defendants, Mr. and Mrs. *Bythsea*, contended that the Leaseholds for Years passed by the Residuary Clause.

[The *Vice-Chancellor* :—The Case of *Doe v. Ludlum* decides that Copyholds will pass by a general Devise of Real Estate. The Leaseholds for Years clearly pass, not by the devise of the Real Estate, but by the Residuary Clause. And it is, I think, manifest from the words of the Will, that the Son is to elect when he attains 21, and that the Daughter can elect only out of the Remainder of the Real Estate.]

Mr. *Pepys* and Mr. *Phillimore*, for the Defendant *C. J. B. Brome* :

The Testator by devising his Real Estates to Sir *C. Saxton* and his Heirs, until his Son shall attain 21; and, in other parts of the Will, he speaks of Real Estate. After devising his Freehold Estate at *Croom's Hill* to his Son and his Heirs, he gives to him so much of his other Real

[*111] Estate. He must be considered as meaning, by those words his Real Estate of the same description in other places, and the Fee-simple Estates will answer the words of the Will without including the Leaseholds for Lives. If a Testator devises all his *Lands*, Leaseholds for Lives will pass: but all the authorities tend to prove that they will not pass under the general words "Real Estate." Those words are in no way applicable to them. An Estate *pour antre vie*, was not considered by the Law as property: it went to a general Occupant, and was no longer Property when the Grantee died. There might be a Person named to take after the first Grantee, as, for instance, the Heir or the Executor: but he came in not as inheriting from the Grantee, but as answering the words of the

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Grant. *Ripley v. Waterworth* (d). An Estate *pour autre vie* required a distinct Statute to enable the Owner to devise it. If it is not devised it is Personal Estate. The Law never recognized it as Real Estate.

Then how are the Limitations in the Will consistent with the Leasehold Property? The Testator has made a provision for his Family for as long a period as the rules of Law will permit; but he has not given any direction as to the renewal of the Leaseholds. He never could have intended the Limitations in his Will to extend to perishable Interest, or else he would have provided for the continuance of them by renewal. In the devise to the Children of his Son, he uses the word *Here ditaments*. His own Children are the Persons for whose lives the Leases were granted (e). Now there are Limitations to [*112] the Children of every one of the Testator's Children; and, consequently, those Limitations must take effect, as to the Children of the survivor, just at the moment when all Interest in the Property determines.

The Case of *Fitzroy v. Howard* does not lead to the decision which the Court is called upon to make on behalf of the Plaintiffs. There the Testator devised "all and every his Lands, Tenements and Hereditaments whatsoever, situate and being in the several Counties of *Middlesex, Hereford and Gloucester*, any or either of them, and all other his Real Estate." So that there was a Local description, and the words "Lands, Tenements and Hereditaments" were also used; and the question was not whether the words "Real Estate" would pass the Leasehold Property, but whether the words "Lands, Tenements and Hereditaments, &c." would pass it; and Lord *Lyndhurst* decided that it did pass by those words: all that he said with respect to the words "Real Estate," was that they did not cut down the words "Lands, Tenements and Hereditaments." In *Thompson v. Lady Lawley* (f), Lord *Eldon*, C. J. says: "When we find Limitations in a Will inapplicable to Personal Estate, though we are not thereby authorized to say that the Personal Estate shall not pass, provided the Testator has used words clearly sufficient to pass it yet the acknowledged inapplicability of those Limitations to Personal Estate, is a circumstance from which the intent may be collected, if the words of devise are ambiguous. In an accurate sense, when a man says "my Lands and Hereditaments," he means those which are "throughout his own. When, there- [*113] fore, we see Limitations which apply to Real Estate as distinguished from Personal Estate, or even when we find that, by holding the lat-

(d) 7 Ves. 425.

(e) It did not appear from the Brief, that this was so, or that the Leaseholds for Years were intermixed with other Estates, as was stated in the Argument for the Plaintiffs.

(f) 2 Bos. & Pul. 303. Sec. 209

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ter to be included in the general Devise, the wish imputed to the Testator to give it to the same Person as the Freehold, may not, by virtue of such Limitations, be gratified for above one moment, we may consider the nature of the Limitations as affording strong evidence that the Testator really had not the intention that the Personal Estate should pass." These words are as applicable to Leaseholds for Lives, as they are to Leaseholds for Years. Perishable Interests will not pass by general words.

The Court has decided that the Son is entitled to priority of Election, and that the time of Election is his attaining 21; and we submit that that Election must be made, simply, out of the Fee-Simple Estates.

Mr. *Gresley*, for the Defendant Sir *C. Saxton*.

The VICE-CHANCELLOR:

The Testator has, in the first instance, given all his Real Estate, whatsoever and wheresoever; and the first question is, what is the meaning of those words. Now, under a *feri facias*, the Sheriff can seize Personal Estate only. He cannot take Leaseholds for Lives; and, therefore, in the legal acceptation of the words "Real Estate," Freeholds for Lives are comprehended.

It has been admitted that the Copyholds pass. Now the Testator devises part of his Real Estate to his Son for his life, without Impeachment of Waste, and gives a power of leasing. These parts of the Will [*114] are, however, "inapplicable to the Copyholds; but, nevertheless, they do not prevent their passing. The mere circumstance that the mode of dealing with the Property, is inapplicable to a particular part of it, will not prevent the passing of that part which is of a particular description. The Testator has given a Commentary on his own words. He first gives to his Son all his Freehold Estate at *Croom's Hill*, and then he gives to him "so much of my *other* Real Estate, &c." This shows that he meant, by the general words used in the commencement of his Will, the same thing as if he had devised, to the Trustee, all his Freehold Estate, and all his Real Estate whatsoever.

In *Fitzroy v. Howard*, Lord *Lyndhurst* does not mean to say that the words "Real Estate" will not pass Leaseholds for Lives, but merely that there were other words, in the Will, under which the Leasehold Estate would pass.

There is, however, more in this Will. The Testator, in the Leasing Power has authorized his Son and Daughter, when they shall be in possession of the Hereditaments and Premises devised to them, to make any Lease or Leases of any parts of the said Hereditaments and Premises. These words show that the Testator contemplated that he had devised, not only Hereditaments, but also other things, which were not inheritable. My opinion,

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therefore, is that the Freeholds, Copyholds, and Leaseholds for Lives passed by the words "Real Estate," but that the Leaseholds for Years did not pass.

The Election made by the Son is valid as against *him; and, [*115] as he is clearly entitled to a proportional part of his Annuity, for the time between the last half-yearly day of payment and his attaining Twenty-one, the Daughter also is entitled to a proportional payment of her Annuity for the same space of time; and, if the surplus Rents received during the Son's minority, are not sufficient to pay those Annuities in full, they must be apportioned according to the Annuities.

MATHER v. THOMAS.

1833: 29th April.—*Will.—Construction.—Mortgage.*

A Testator, after several Devises and Bequests, gave, devised and bequeathed all his Messuages, Chattels real, Ready Money, *Securities for Money*, Debts, and Personal Estate to A. and B., *their Heirs*, Executors, Administrators and Assigns, upon certain Trusts: Held that the Legal Estate in the Premises mortgaged to the Testator in Fee, passed to A. and B., the Trusts declared not being repugnant to that Construction.

By Lease and Release of the 30th of April and 1st of May 1783, *Rice Thomas* mortgaged certain Messuages, Lands and other Hereditaments situate in the Isle of *Anglesey*, to *Joseph Crewe*, in Fee, for securing 1,000*l.* and Interest.

Joseph Crewe, by his Will dated the 19th of April 1799, gave to his Servant, *Martha Jones*, and her Assigns, for her life, an Annuity of 20*l.*, to be issuable and payable out of the Real and Personal Estate thereafter by him given, devised and bequeathed to or in Trust for *John Capper*; and, after giving several specific and pecuniary Legacies, he gave and devised, to the said *John Capper* and his Assigns, for his life, subject and charged with the Annuity to *Martha Jones* and also with some other Annuities, all his several Messuages or Dwelling-houses, Shops and Hereditaments, with their Appurtenances, situate on the East side of **Northgate-Street*, [*116] in the City of *Chester*, then in the several holdings or possessions of the Persons therein named, and also all his several Messuages or Dwelling houses, Shops, Rooms, Stables, Hereditaments and Premises, situate on the East side of the same Street, in the holdings or possessions of the Persons therein named; and also all his Eighth Part or Share of and in the Works for supplying the City of *Chester* with Water, and of the Buildings, Engines, and Appurtenances thereto belonging, to hold, subject and charged as afore-

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said, unto *John Capper* and his Assigns, for his life, without Impeachment of Waste, and, from and after the decease of *John Capper*, the Testator gave and devised the said Premises, subject and charged as aforesaid, unto and amongst all and every the Child and Children of the said *John Capper*, equally, share and share alike, as Tenants in Common, and to their respective Heirs; and, after devising all his Estate and Interest in certain Messuages or Dwelling-houses, Shops, Coach-houses, Stables, and his Part or Share of the Linen Hall, in the City of *Chester*, and all other the Premises which he held under the Dean and Chapter of *Chester*, subject to the Rent and Covenants, in the original Leases thereof granted, reserved and contained, and to the several Annuities in his Will mentioned, unto *William Currie* and *Richard Mytton*, their Executors and Administrators, during the continuance of such Leases, in Trust for *John Capper*, during his life, and, after his death, for his Children, as Tenants in Common, and their Executors and Administrators, and, after bequeathing some other pecuniary Legacies, the Testator proceeded thus:—"And, as for and concerning all my Messuages or Dwellinghouses, Buildings, Chattels real, Ready Money, *Securities for Money*, Debts to me owing, and Personal Estate of any [117*] nature *or kind soever, (save what are hereinbefore by me otherwise disposed of,) I give, devise and bequeath the same and every part thereof, unto the said *William Currie* and *Richard Mytton*, their Heirs, Executors, Administrators and Assigns, upon the Trusts hereinafter mentioned and declared of and concerning the same, (that is to say) in Trust that they the said *William Currie* and *Richard Mytton*, or the Survivor of them, and the Executors and Administrators of such Survivor, do and shall, of their own proper authority, and at their own discretion, lay out, invest, and place so much thereof as consists of Money, in the names or name of them the said *William Currie* and *Richard Mytton*, or the Survivor of them, or the Executors and Administrators of such Survivor, in the Public Stocks or Funds, or in Government or other real Securities at Interest, and to be, from time to time, called in, altered and varied by them as occasion shall require, in which case the Receipt or Receipts of my said Trustees shall be a good and sufficient discharge or discharges for so much of the said Money so called in as shall be therein expressed or acknowledged to be received, and the Person or Persons paying in the same, shall not, nor shall his, her, or their Heirs, Executors, Administrators or Assigns, afterwards be obliged to see to the application of such Money, or be accountable for any loss, misapplication or non-application thereof, or of any part thereof respectively: and upon this further Trust, that they the said *William Currie* and *Richard Mytton*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do pay, apply, and dispose of the clear yearly Dividends, In-

1833.—*Mather v. Thomas*.

terest or Produce of the Money so to be invested, and also of the Rents, Issues and Profits of my said last devised Chattels real, as the same shall, "from time to time, arise and be received, unto the said [*118] *John Capper* and his Assigns, for and during the term of his natural life, and, from and immediately after his decease, upon further Trust that they my said Trustees, or the Survivor of them, or the Executors or Administrators of such Survivor, do and shall pay and divide such Residue, or assign or transfer the Securities which shall be then subsisting for the same, unto and amongst all and every the Child and Children of the said *John Capper* that shall be living at the time of his decease or born in due time afterwards, share and share alike." And the Testator appointed *Currie* and *Mytton* Executors of his Will.

The Testator died in 1801; and the 1,000*l.* remained unpaid at his death.

The question was whether the Legal Estate in the Mortgaged Premises, passed, by his Will, to *Currie* and *Mytton*.

Mr. Pepsy and *Mr. Lynch*, for the Plaintiffs, said that the words "Securities for Money," were sufficient to pass the Mortgaged Property; *Cripps v. Grysil* (a); especially as the word "Heirs" occurred in the Devise; that there was nothing inconsistent in the Trusts of the Will, to prevent the Mortgaged Estate from passing; but, on the contrary, it was necessary that *Currie* and *Mytton* should take the Legal Estate, to enable them to perform the Trusts: that this Case fell within the reasoning of *Bayley J.* in *Galliers v. Moss* (b), and was "distinguishable from *Sylvester* [*119] *v. Jarman* (c), where the Property devised was subjected to the payment of Debts, which was a purpose to which a Mortgaged Estate was not applicable. *Lord Braybrooke v. Inskip* (d); *Renvoize v. Cooper* (e).

Mr. Knight and *Mr. Cockerell*, contra:

This Case is not distinguishable from *Galliers v. Moss*; and your Honor cannot decide that the Legal Estate in the Mortgaged Premises passed under this Will, without over-ruling that Case. There the Trusts were to be performed by the Trustees and their Heirs.

[*Vice-Chancellor* :—This Case is the converse of *Galliers v. Moss*; for, here, the devise is to the Trustees and their Heirs, and the Trusts are to be performed by them and their Executors. Supposing that the Testator had had other Freehold Estates than those devised in the preceding part of his Will, would not they have passed by the Residuary Clause? Here the word "Heirs" is applicable to the words "Messuages or Dwelling-houses;" but,

(a) Cro. Car. 37. See this Case stated from the Record, 9 Barn. & Cress. 282.

(b) 9 Barn. & Cress. 267.

(c) 10 Price, 76.

(d) 8 Ves. 417.

(e) Madd. & Geld. 371.

1834.—Knight v. Knight.

in *Galliers v. Moss*, there were no such words. The opinion expressed by Sir John Leach, V. C., in *Renvoize v. Cooper*, was extra-judicial, and was not necessary to the decision of the Case.]

Mr. G. Richards, appeared for *Rice Thomas*.

The Vice-Chancellor intimated his opinion to be that the Legal Estate in the Mortgaged Premises, passed by the words "Securities for Money;" but said that he could not, with propriety, decide the Case in the face [*120] of the decision of the Court of King's Bench in *Galliers v. Moss*; and, therefore, the proper course would be to send a Case for the opinion of another Court of Law.

A Case was accordingly sent to the Court of Common Pleas.

The Judges of that Court returned the following Certificate: "We have heard this Case argued by Counsel and considered it; and we are of opinion that the Legal Estate in the Premises comprised in the Indenture of Mortgage of the 1st day of May 1783, passed, under the Will, to *W. Currie* and *R. Mytton* and the Survivor of them, by the devise of the Testator's Securities for Money to the said *W. Currie* and *R. Mytton*, their Heirs, Executors, Administrators and Assigns (f).

N. C. Tyndal.

J. A. Park.

S. Gaselee.

J. B. Bosanquet."

On the Case coming on again before the Vice-Chancellor, on the 2d July 1833, his Honor made a declaration in the terms of the Certificate.

[*121]

*KNIGHT v. KNIGHT.

1834: 16th April.—*Settlement.—Construction.—Separate Use.*

By a Marriage Settlement, Money and Stock were assigned to Trustees, in Trust, to receive the Income during the Life of the Lady, and pay the same to her for her separate use, or as she should appoint, *Notwithstanding her Coverture*, but no Payment to be made by anticipation, and it was declared that the Income should not be subject to the Debts, &c. of *R. G.*, her intended Husband, and, after her decease, in case he should survive, in Trust to permit him to receive the Income for his life, &c. The Husband died in the lifetime of his Wife, and she married again. Held that the Provision for the separate use of the Lady without anticipation, was confined to the first Marriage.

By the Settlement made in contemplation of the Marriage between *Robert Giveen* and *Caroline Lambert*, dated the 26th of July 1824, the

(f) 10 Bing. 44. See *Le Gros v. Cockerell*, ante Vol. V. 384, and *In re Tyas*, ibid. 451.

1834.—Knight v. Knight.

Lady assigned and transferred to Trustees, a messuage in *Wimpole-street* and certain Sums of Money and Stock, in Trust, after the Marriage, to receive the Income of the Trust Property, during her life, and pay the same into her hands, for her own sole and separate use and benefit, or as she should, by writing under her hand, *notwithstanding her Coverture*, direct or appoint, but no payment to be made by anticipation or before the same should become due. And it was declared that the said Income should not be subject or liable to the Power, Control, Debts, Forfeiture, Intermeddling, Engagements or Incumbrances of *Robert Giveen her intended Husband*, in any manner whatsoever, and that the Receipt or Receipts of *Caroline Lambert*, signed with her own hand, or of such Person or Persons as she should appoint in Writing, should, from time to time, be a good and sufficient Discharge or Discharges for the same, and, from and immediately after her decease, in case *Robert Giveen* should survive her, in Trust to permit and suffer him to receive and take such Income, for his life, and, from and after the decease of the Survivor of them, in Trust for the [*122] benefit of all and every the Children or Child of *Caroline Lambert* by *Robert Giveen* or any future Husband after his decease, in manner following, (that is to say) in case there should be but one Child of *Caroline Lambert* by *Robert Giveen* or any future Husband as aforesaid, the whole of such Trust Premises and the Income thereof to belong to such Child, and to be vested in him or her at the usual periods, and to be transferred or assigned to him or her, at the same time, if the same should happen after the decease of the Survivor of them the said *Robert Giveen* and *Caroline Lambert*; but, if the same should happen in the lifetime of them or the Survivor of them, then immediately after the decease of such Survivor: and, if there should be two or more Children of *Caroline Lambert* by *Robert Giveen* her intended Husband, or any future Husband, then the whole of such Trust Premises and the Income thereof, to be for the Portions of such two or more Children, and to be divided between or among them in equal Shares, and the Shares to be vested in them respectively at the usual times, and to be transferred or assigned to them at the same times, if the same should happen after the decease of the Survivor of *Robert Giveen* and *Caroline Lambert*, but if not, then immediately after the death of the Survivor: and in case there should be no Child or Issue of *Caroline Lambert* who, under the Trusts thereinbefore declared, should become entitled to a vested interest in the Trust Premises, then in Trust that the Trustees should, after the decease of the Survivor of *Robert Giveen* and *Caroline Lambert*, his intended Wife, stand possessed of the Trust Premises, in Trust for such Persons, &c. as *Caroline Lambert*, *notwithstanding her Coverture*, by her *Will, (which, notwithstanding her Coverture, she was [*123]

1834.—Knight v. Knight.

thereby, and by the said *Robert Giveen* her intended Husband, authorised and empowered to make,) should bequeath the same, and, in default of such Bequest, in Trust for the Next of Kin of *Caroline Lambert*, as if she had died a *feme sole* or had not been married, according to the Statute of Distributions.

Robert Giveen having died, his Widow married *Charles Knight*.

The Bill was filed, by Mr. *Knight*, against his Wife and the surviving Trustee of the Settlement of July 1824, insisting that the Trusts for the separate use of, and against anticipation by Mrs. *Knight* were only applicable to, and ceased with her Marriage with *R. Giveen*, and, that on his death, she became entitled to receive, during her life, and to alien and charge the Income of the Trust Premises, and that her Marriage with the Plaintiff, was an Assignment to him, in Law, of such Income. The Bill prayed that the Plaintiff might be declared to be entitled to receive and assign the Income of the Trust Premises, as he should think proper, during the joint Lives of himself and his Wife, and that the surviving Trustee of the Settlement might be decreed to pay the same to the Plaintiff or his Assigns, accordingly.

Mrs. *Knight*, by her Answer, submitted to the Judgment of the Court, whether she was or not entitled to the Income of the Trust Premises, for her separate use, without having power to anticipate the same.

[*124] *Sir *Edward Sugden* and Mr. *Chandless*, for the Plaintiff, said, that a Trust for the separate use of a Woman, with a restraint on Alienation, if created with a view to a particular Marriage, was good for that Marriage; but, if it was created with a view to every Marriage that a Woman might contract, it was bad: that the provision was introduced in order to enable a married Woman to enjoy Property as if she were *sui juris*: that the moment the Marriage ceased, the object for which the provision was introduced ceased; and, therefore, it would be absurd to hold that a Trust could exist for the separate use of a Woman who was under no disability.

Secondly, that there was not a word in the Settlement, that did not point to the first Marriage only, and, therefore, the provisions of the Settlement could not be extended beyond it. *Newton v. Reid* (a); *Woodmeston v. Walker* (b); *Jones v. Salter* (c); *Tudor v. Samyne* (d); *Barton v. Briscoe* (e).

Mr. *Knight* and Mr. *Kindersley*, for the Defendants, relied on *Beable v. Dodd* (f), and on the Judgment of the Master of the Rolls in *Woodmes-*

(a) *Ante*, vol. IV. p. 141.

(b) 2 Russ. & Myl. 197.

(c) 2 Russ. & Myl. 208.

(d) 2 Vern. 270.

(e) *Jacob*, 603.

(f) 1 T. R. 198.

1834.—Knight v. Knight.

ton v. Walker, and added that, if a Trust for the separate use of a Woman, could not be created except with a view to a particular Marriage, it would be out of the power of a Father having an unmarried Daughter, to make a provision for her, by his Will, so as to guard her from the extravagance of a future Husband; and that, as a Trust might *be cre- [*125] ated for the separate use of a married Woman, so a similar Trust might be made to take effect on the Marriage of a single Woman.

The VICE CHANCELLOR:

The Settlement does not contain any declaration of Trust in favour of this Lady, in case her intended Husband should die in her lifetime. The first Limitation is to the Trustees, in Trust, during the life of *Caroline Lambert*, to receive the Interests, Dividends, and Annual Produce of the Trust-Property, Monies, Stocks, Funds and Securities, and pay the same into the hands of the said *Caroline Lambert*; and the Trust next declared, is to take effect from and immediately after the decease of the said *Caroline Lambert*. So that there is no expression of Trust for her, during that part of her life that might endure beyond the life of her intended Husband. Consequently, we must look at the first words in the Settlement as constituting a Trust for the whole of her life. Then words of modification and restriction are added: "To and for her own sole and separate use, or as she shall, by writing under her hand, notwithstanding her coverture, appoint, but no payment to be made by anticipation or before the same shall become due." The words: "notwithstanding her Coverture," must mean the Coverture then in contemplation. And then it is declared that: "the said Income, Interest, Dividends and Annual Produce, shall not be subject or liable to the Power, Control, Debts, Intermeddling or Engagements of the said *Robert Giveen*, her intended Husband." That Clause, manifestly, alludes to the intended Coverture.

It appears to me, therefore, on the face of this *Instrument, [*126] that all the machinery by which the Income of the Trust Property is secured for the separate use of this Lady, without anticipation, was introduced into the Settlement, with reference to that Marriage only which she was then about to contract.

Whatever may be thought of *Newton v. Reid*, it is supported by the decision of the Lord Chancellor in *Woodmeston v. Walker*.

In my opinion this is the case of a Trust created for the life of this Lady, with Limitations and Restrictions which were binding during her Marriage with her first Husband, but not beyond it: and, consequently, her present Husband is entitled to receive and dispose of the Income of the Trust Property during the Coverture.*

* See the next case.

1835.—Benson v. Benson.

BENSON v. BENSON.

1835: 20th January.—Will.—Construction.—*Separate Use.*

Testator directed the Interest of 10,000*l.* to be for the separate Use of his Daughter *Jane Lane*, the Wife of *J. Lane*, for her life, free from the Debts of her Husband. The Husband died, and his Widow married again. Held that the Trust for her separate use ceased on the death of her first Husband.

Qu. Whether a Trust for the separate use of a single Woman is valid.

THOMAS HOWARD GRIFFITH by his Will dated the 1st of August 1821, after devising a Plantation in *Barbadoes*, called *Windsor*, and all other his Estate and Property of whatever nature, whether Real, Personal, or mixed, and whether in *Barbadoes*, *England*, or elsewhere, to his eldest [*127] Son, the Defendant, *Thomas *Griffith*, his Heirs, Executors, Administrators and Assigns, subject to the payment of his Debts, Funeral and Testamentary Expenses and Legacies, proceeded thus: "I do hereby charge and make my said Plantation called *Windsor*, and the Lands, Buildings, Slaves and Stock thereof liable to the payment of the Sum of 10,000*l.* *Barbadoes* currency, at lawful Interest from the day of my death, to the following uses, that is to say, the Annual Interest to accrue thereon to be to and for the sole, separate and exclusive use and benefit of my Daughter, *Jane Abel Lane*, the Wife of *John Branford Lane*, Esq., for and during her natural life, totally free and independent of the Debts, Control or Engagements of her Husband, and for which her Receipt alone, or the Receipts of such Person or Persons as she shall alone appoint, from time to time, to be a sufficient discharge; and I do direct that such Interest shall be paid to her at the end of every Six Months, either in this Island or in England as she shall desire." And the Testator disposed of the 10,000*l.*, after the death of his Daughter, in manner therein mentioned.*

The Testator died in 1823. *John Branford Lane* died in 1829; and his Widow intermarried with the Plaintiff in December 1831.

The Bill prayed that it might be declared that the Plaintiff, on his Marriage, became absolutely entitled to receive the Interest which, during the life of the Defendant, his Wife, should accrue due in respect of [*128] the Legacy of 10,000*l.* *Barbadoes* currency, and that the *balance of Interest then due, and all the Interest which, during the life of his Wife, should accrue due, might be paid to him.

The Defendants put in a general Demurrer.

Mr. *Knight* and Mr. *Blenman*, in support of the Demurrer:

* The Will was set forth, as above, in the Bill: but The Vice-Chancellor read and commented upon some of the subsequent parts of it, which are stated in his Judgment.

1835.—Benson v. Benson.

There is no case that decides that an enduring Trust may not be created for the separate use of a married woman. There is a *dictum* to that effect in *Massey v. Parker* (a); but it was extra-judicial: the point decided was that the language of the Will did not create a Trust for the separate use of the Testatrix's Grand-daughter. *Woodmeston v. Walker* (b) merely decides that, where a Trust is created for the separate use of a single woman, with a Clause against anticipation, she may alienate the Property before Marriage. In *Barton v. Briscoe* (c), it was decided that the Clause restraining a married woman from anticipating her separate Property, operates during the continuance of the Coverture only. That Clause is of modern invention; and Trusts for the separate use of married Women, and restraints on Alienation by them, are wholly independent of each other. *Acton v. White* (d); *Adamson v. Armitage* (e); — *v. Lyne* (f); and *Anderson v. Anderson* (g), are, all of them, Cases in which the Clause against anticipation would have been "inoperative; [*129] but effect was given to the Trust for separate use.

Mr. *Kindersley* and Mr. *Chandless*, in support of the Bill :

There are two points in this Case, on either of which, if we are right, this Demurrer must be overruled : 1st. By the language of the Will, the exclusion of the marital right is confined to *J. B. Lane*, and is not extended to a second Husband. The *dicta* in *Massey v. Parker* (h), and the decisions in *Tyler v. Lake* (i), and *Knight v. Knight* (k), show that, in order to exclude the marital right, the intention must be clear. Here the Testator charges his Plantation, called *Windsor*, with the payment of 10,000*l.*, "the Interest to be for the sole, separate and exclusive use and benefit of my Daughter, *Jane Abel Lane*, the Wife of *John B. Lane* for and during her natural life, totally free and independent of the Debts, Control, or Engagements of her Husband." This, plainly, excludes the marital right of that Husband only whom the Testator has just named.

2ndly : Supposing that there was an intention, apparent on the face of the Will, to exclude the marital right, not only of *J. B. Lane*, but of all future Husbands of this Lady, that intention could not prevail. The two decisive Cases on this point, are *Woodmeston v. Walker*, and *Massey v. Parker*. The reasoning of the *Master of the Rolls*, in the latter Case, is extremely important (l). And, though it was said the opinion expressed by that learned Judge was extra-judicial, "because the [*130] words of the Will were not sufficient to exclude the marital right,

(a) 2 Myl. & Keen, 174.

(b) 2 Russ. & Myl. 197.

(c) Jacob's Rep. 603.

(d) 1 Sim. & Stu. 429.

(e) 19 Ves. 416.

(f) 1 Younge, 562.

(g) 2 Myl. & Keen, 437.

(h) 2 Myl. & Keen, 174.

(i) *Ante*, Vol. IV. 144, and 2 Russ. & Myl. 183. Vol. VI.(k) *Ante*, p. 121.

(l) See 2 Myl. & Keen, 182, 18 .

1835.—*Benson v. Benson.*

yet his *Honor* held that, if the intention to give the income of the Property for the separate use of the Grand daughter, had been sufficiently expressed, still, upon principle, he should have had no doubt that the right of the Husband was not excluded. In *Adamson v. Armitage*, *Anderson v. Anderson*, and — *v. Lyne*, the question was not brought to the attention of the Court. The law was taken to be settled, and the point here raised, was not discussed.

[The *Vice-Chancellor* :—Suppose a Father seised in Fee, devises to Trustees and their Heirs, in Trust for the separate use of an Infant Daughter, and she attains 21 and marries, could the Husband file a Bill, against the Trustees, to have the legal Estate conveyed to him, and so defeat the intention of the Testator ?]

Yes: but the Daughter may, if she chooses, prevent the mischief, by settling the Property previously to her Marriage, to her separate use.

[The *Vice-Chancellor* :—It is very important to Persons having Daughters and female relations for whom they wish to provide, and whose interests it may be necessary to protect, that the principle which you contend for, should not be established until the subject has been well considered. Regard ought also to be had to the practice of Conveyancers. As far as that practice goes, Trusts like the present, have prevailed for more than a century.]

[*131] *The Conveyancers now consider the Law to be settled as we contend for. *Newton v. Reid* (m), and the other Cases in which the restraint on alienation has been held to be void, closely apply to the present Case. But *Massey v. Parker* is a direct authority that a Trust for separate use, can be created in favour of a married woman only; and this Demurrer cannot be allowed without overruling that Case.

[The *Vice-Chancellor* :—In *Brandon v. Robinson* (n), Lord Eldon decided that the Clause against anticipation was inconsistent with the enjoyment of the Property given, and was, therefore, void: but the question here is, simply, whether you can protect an unmarried Woman, in Equity, by creating a Trust for her separate use. *Newton v. Reid* did not interfere with that question. There the married Woman and her Husband combined to assign her separate Property; and no one doubted that they might do so, unless they were prevented by the Clause against Alienation; and the decision only went to this, that the restriction on Alienation was rendered ineffectual by the context of the Will, but no opinion was expressed as to the effect or operation of the previous words.]

Supposing the Trust in this Case should be held to be good, then we su b.

(m) *Ante*, Vol. IV. p. 141.

(n) 18 Ves. 429, and 1 Rose, 197.

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mit the Marriage is, in effect, an Assignment of the Wife's Property to the Husband.

[The *Vice-Chancellor* :—That is not the Law : for, if the Husband does not assign the Chattels real of his Wife, during the [*132] Coverture, they survive to her on his death. So, if the Husband does not recover, during the Coverture, the *Choses in action* of his Wife, they will not go to his Executor, but survive to her : and, if she dies in his lifetime, he must take out Letters of Administration to her.]

Mr. *Knight*, in reply :

In *Beable v. Dodd* (o), the words of the Will were similar to those in the present Case, and *Willes* and *Ashhurst*, Justices, decided, on the construction of those words alone, without reference to the Codicil, that the restriction was not confined to the then Husband, but was meant to extend to any future Husband. Here the Trust for the separate use of the Daughter, is to continue *during her natural life*, free from the Debts, &c. of her Husband. Testator does not say "her *said* Husband;" but these latter words must be connected with the former. Besides, when the Testator had said, "for her separate use," he had said enough; for, though the subsequent words are familiarly added, they are surplusage: why then are they to cut down the previously expressed general intention? Again, the Testator does not say that the Receipts shall be sufficient discharges during the life of the Husband, but during the life of his Daughter. It is clear, therefore, on the face of the Will, that the Testator meant the Trust to extend not only to the then, but to any future Husband.

Both practice and authority are against the second point contended for on the other side.

*The VICE-CHANCELLOR :

[*133]

I should be extremely unwilling to decide upon the second point, unless I were obliged to do so. The language of the Will in this Case, relieves me from that necessity: for I think that the words of the Will must be taken to create a Gift for the separate use of this Lady, during the life of her first Husband only. The Testator, after charging his Plantation with the 10,000*l.*, directs the annual Interest to be to and for the separate use of his Daughter *Jane*, the Wife of *John Branford Lane*, for her life, totally free and independent of the Debts, Control or Engagements of her Husband. This means, according to the plain sense of the words, her Husband *J. B. Lane*, and no other Person. The Will then proceeds as follows: "And, from and after the death of my said Daughter, *Jane Abel Lane*, I do give and bequeath and dispose of the said Sum of 10,000*l.*, unto and amongst all and every the Children of my said Daughter by her said Husband the

(o) 1 T. R. 193.

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said *J. B. Lane*." That fixes the Testator's meaning to be the Husband whom he had before spoken of. The Will then goes on thus: "Save and except the Child who shall be entitled to and become possessed of *Castle Grant* Plantation, situate in the parish of *St. Joseph* in this Island, and of which the said *John Branford Lane* is now seised and possessed for the term of his natural life, to be equally divided between and amongst them, share and share alike, at the age of 24 years, if Sons, and at the said age of 24 years, or day or days of Marriage, if Daughters, whichever event shall first happen, and should any or either of the Children of my said Daughter, being a Son or Sons, depart this life under the said age of 24 years, or, being a

Daughter or Daughters, shall depart this life under the said age [*134] of 24 years and unmarried, then and in such case the Part, Share and Proportion of him, her or them so dying, shall go to and be equally divided amongst his, her or their surviving Brothers and Sisters, and be paid at the same time with his, her or their original Part, Share and Proportion. Provided always, and my will and meaning is that, in such survivorship, the Child taking or being entitled to take the said *Castle Grant* Plantation, shall not be included or participate therein: and should it so happen that all the Children of the said *Jane Abel Lane* shall depart this life, being Sons, under the age of 24 years, or Daughters under that age and unmarried, then I do direct that the said Sum of 10,000*l.* shall sink in my said Plantation called *Windsor* for the benefit of my Son *Thomas*: or should it happen that there should be a Survivor of the Children of my said Daughter, and such Survivor should take or be entitled to take the said *Castle Grant* Plantation, in such case the said sum of 10,000*l.* shall not go or belong to such Survivor, but the same shall, in manner as aforesaid, sink in the said Plantation for the benefit of my said son *Thomas* and his Heirs. And I do direct, and my will and meaning is that, should any or either of the Children of my said Daughter attain the age of 24 years, being a Son or Sons, or, being a Daughter or Daughters, attain that age or be married in her life-time, that his, her or their Part, Share and Proportion in the said Sum of 10,000*l.*, shall be a vested Interest, although the payment thereof be postponed until after her death, save and except the Child who shall take or be entitled to take the *Castle Grant* Plantation, who, as I have hereinbefore declared, is not to participate in the said Sum of 10,000*l.* ;

[*135] but if, at the time of the death of my said Daughter, any or either of her Children entitled as hereinbefore directed, to a Part, Share or Proportion of the said sum of 10,000*l.*, shall not be of the age of 24 years, if Sons, and shall not be of the like age or married, if Daughters, then I do direct that, until those events shall happen, the Annual Interest to accrue on the said Sum of 10,000*l.* shall be paid, applied and disposed of

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for and towards their Maintenance and Education in the proportion of their respective Shares of and in the said principal Sum of 10.000*l*.”

It seems, therefore, that the Testator took it for granted that the Husband would outlive his Daughter, and that it never occurred to his mind that his Daughter might survive her Husband.

I am not, therefore, under the necessity of deciding the second Point, for I am of opinion that, by the words of this Will, no Trust was created for the separate use of this Lady, except during her Marriage with *J. B. Lane*.*

*HILL v. HILL.

[*136]

1834: 11th April.—*Power of Sale and Exchange.—Marriage Articles.—Construction.*

By Marriage Articles, it was agreed that Estates should be settled in strict Settlement, and that there should be contained, in the Settlement, Powers to the Husband, to charge the Estates, by way of Mortgage, with a certain Sum, and also to charge the Estates with another Sum for younger Children, and to create Terms for raising those Sums, and likewise all other Powers, &c. usually inserted in Settlements of the like nature, and which should be proper for effecting any of the Purposes aforesaid. Held that a Power of Sale and Exchange might be introduced into the Settlement.

By an Indenture made the 21st of July 1831, between *Arthur Clegg*, Esquire, of the one part, and *Sir Rowland Hill*, of *Hawkstone*, in the County of *Salop*, Bart., of the other part, after reciting that a Marriage had been agreed upon between *Sir R. Hill* and *Ann Clegg*, the Granddaughter of *Arthur Clegg*, and that it had been agreed that *Sir R. Hill* should, within six months from the date of the Indenture, convey and assure all the Manors, Towns, Villages, Messuages, Farms, Lands, Tithes and Hereditaments of him the said *Sir R. Hill*, situate in the County of *Salop* and elsewhere, to the uses thereafter expressed, and that *Arthur Clegg* had agreed to pay certain Debts and Engagements of *Sir R. Hill*, secured upon the said Estates in the County of *Salop* and upon the Bonds and Promissory Notes of the said *Sir R. Hill*, to the amount of 100,000*l*., in manner thereafter expressed: *Sir R. Hill* covenanted with *Arthur Clegg*, to convey all the Manors, Towns, Villages, Capital or other Messuages, Farms, Lands, Advowsons, Tithes and Hereditaments of him the said *Sir R. Hill*, situate in the County of *Salop* or elsewhere in *England*, to Trustees, to be mutually agreed upon between the Parties, and their Heirs, subject to such Mortgages or other Charges and Incumbrances as should affect the same after the application of the Money thereafter covenanted by *Arthur Clegg* to be paid and applied as

* See the preceding Case.

1834.—Hill v. Hill

thereinafter mentioned, to the use of Sir *R. Hill* for life, without Impeachment of Waste.*

By the Order on Directions, it was declared that the Estates ought to be limited in the manner reported by the *Master*; and it was referred back to him to settle Deeds of Settlement accordingly. In pursuance of this Order, a Draft of a Settlement was left in the *Master's* Office, containing the usual Powers of Sale and Exchange. The *Master*, in settling the Draft, struck out those Powers, conceiving that they were not authorised by the Articles; and he afterwards reported that he had settled the Draft, excluding such Powers: whereupon the Plaintiffs excepted to his Report.

Sir *E. Sugden*, Mr. *Coote*, and Mr. *Geldart*, in support of the Exceptions, said that the Articles were very inartificially drawn, for Estates for Life were given to unborn Children, with remainders to their Issue: that the *Master* had conceived that the word *and*, in the last Clause of the sentence relating to the Powers to be introduced into the Settlement, ought to be read as conjunctive, whereas it ought to be read as disjunctive.

Mr. *Knight* and Mr. *Tyrell* for the Report:

In *Wheate v. Hall* (a), Sir *William Grant*, M. R. was of opinion that a Power of Sale and Exchange was not authorised by the Will. Undoubtedly, there was no express provision, in that Case, that such a Power ['140] or should be inserted; but there was a direction, giving every necessary authority to the Trustees.

Peake v. Penlington (b), is very shortly reported. It does not appear what else was contained in the Articles, besides the Clause relating to the Powers, nor what was the magnitude, nature, or description of the Estate comprised in the Articles. That Case, too, was not argued at any length, nor was the Case of *Wheate v. Hall* brought to the attention of Lord *Eldon*. Besides, in *Peake v. Penlington*, the approbation of the Trustees was required as to the Powers to be contained in the Settlement: and, in *Brewster v. Angell* (c), Lord *Eldon*, in his Judgment, alludes to that circumstance, and seems inclined to narrow the doctrine which he is reported to have laid down in *Peake v. Penlington*. His Lordship says: "In *Peake v. Penlington* the direction was that the Settlement should contain a power for the Husband and Wife and the Survivor, to appoint new Trustees; a Power to a Tenant for Life to appoint new Trustees, is, certainly, a usual Power; and it then went on to say, 'and also all such other Powers and Provisions, &c. as are usually contained in Settlements of the like nature, as should be approved of by the Trustees or the Survivor, &c.' Then it was said the

(a) 17 Ves. 80.

(b) 2 Ves. & Beam. 311.

(c) 1 Jac. & Walk. 625.

* A paragraph is necessarily omitted here; the substantial matter of which may be inferred from the synopsis of the case.

1843.—Hill v. Hill.

meaning of that was that those Powers should be such as they or the Survivor should approve of; and no doubt a Power of selling and exchanging by Trustees, with the consent of the Tenant for Life, is a usual and proper Power." His Lordship, therefore, was of opinion that there ought to be some check on the exercise of the Power.

*In *Horne v. Barton* (d), which is the same Case as *Brewster* [*141] v. *Angell*, Sir T. Plumer, M. R., says: "The Will contains no express authority for the insertion of a Power of Sale and Exchange. If such an authority be given, it is only by general words, &c." These two Cases show that general words, though found in a Will inartificially framed, will not authorise the insertion of a Power of Sale and Exchange.

In *Pearse v. Baron* (e), the Articles stipulated that the Settlement should contain a Power of Leasing for 21 years in possession, a Power of Sale and Exchange, of appointing new Trustees, "and all such other Powers, Provisions, Clauses, Covenants and Agreements as are usually inserted in Settlements of the like nature." The Property was situate near *Waterloo Bridge*, and was extremely well adapted for building purposes; and the question was, whether a Power for granting Building Leases, for a longer term than 21 years, could be introduced. It was almost impossible to give effect to any Clause in the Settlement unless that Power was contained in it. But yet the *Master of the Rolls* was of opinion that the general words did not authorise the introduction of such a Power.

[The *Vice-Chancellor*:—In that Case a certain Power of Leasing was specified. If, in these Articles, it had been said that there should be inserted a Power to sell or exchange the Estates in the County of *Hereford*, and all other usual Powers, I should have held that the Power could not be extended to Estates in any other County; for then it would have been *expressed to what Estates the Parties intended that the [*142] Power should apply.]

If the Court once begins to insert Powers in Settlements, under general words like those in the present Case, where is it to stop? (f). It is extremely difficult to know what is the nature of a Power which the Court is to hold *usual*. In some Cases it might be proper to insert a Power of Sale and Exchange, and, in other Cases, it might not. In this Case, the Family is one of great antiquity; and the Mansion and Estates have belonged to the Family for many generations. Would it then be proper to introduce a Power extending over everything in the Settlement, under which, the Mansion and Estates might be alienated from the Family? It is not the prac-

(d) Jacob's Rep. 437.

(e) *Ibid.* 153.

(f) The *Vice-Chancellor*, in the course of the argument, referred to *Williams v. Carter*, of which he said he had a manuscript note. That Case will be found in Sugd. Pow. Appendix, No. 5.

1854.—Hill v. Hill.

tice of Conveyancers to insert, in every case, Powers of Sale and Exchange, extending over all the Property in the Settlement, unless they are specifically instructed so to do. In many Cases where such Powers have been introduced into Drafts, the Parties have ordered them to be struck out. In almost every instance, they are confined to certain portions of the Estates, or to certain Counties, or they are otherwise modified according to the particular circumstances of each case. In this Case it is most probable, if attention had been paid to this Power, that it would have been directed to be confined to the purchase of Estates in *Shropshire*. But, as the matter now stands, if the Power is introduced at all, it must extend to every County and over all the Property in the Settlement; for the Court has no guide [*143] to direct it where the line ought to be drawn. Again, are Powers to be inserted to lease Farms and Mines and to grant Building Leases, and upon what terms? Are there to be Powers for jointuring future Wives and charging the Estates with Portions for Children of future Marriages, and to what extent? The Court has nothing to guide it with respect to these particulars, any more than it has with respect to the restrictions and qualifications to which the Power of Sale and Exchange ought to be subjected. It appears, from what Lord *Eldon* says, in *Brewster v. Angell*, that some check ought to be imposed; and, certainly, no one would think of leaving the exercise of such a Power to the uncontrolled discretion of the Tenant for Life. If the Power to appoint new Trustees is given to the Tenant for Life, then the Power of changing the Estate is placed, substantially, in his hands. There is no settled form by which the discretion is to be controlled. In some Settlements, the Power is to be exercised by the Trustees with the consent of the Tenant for Life; in others, it is to be exercised by the Tenant for Life with the consent of the Trustees. In some cases the Power is made to extend over the whole of the settled Estates; in others, it is confined to a particular part of them, and to particular Counties. Amidst all these different forms, which is the Court to adopt as being usual?

The Articles direct certain purposes to be effected by the Settlement, namely, the raising of a Sum of Money by Mortgage, and the charging of the Estates with Portions for the younger Children of the Marriage; and then the Articles direct that there shall be inserted, in the Settlement, "all other Powers, Provisoes, Clauses, Covenants and Agreements [*144] usually inserted in Settlements of the like nature, and which shall be proper for effecting any of the purposes aforesaid." The observations which we have hitherto submitted to the Court, have been founded on the assumption that the word *and*, here, is to be construed disjunctively, and that the latter member of the sentence is to be considered as not controlling the former. But it must be remembered that this is the Case of a

1834.—Hill v. Hill.

Deed, and not of a Will. Can the Court then change a word for the purpose of introducing a Power, which no one can be sure was in the contemplation of the Parties, and which might have the effect of entirely disappointing their intention? If the Argument in support of the Exceptions is to prevail, the latter member of the sentence will become mere surplusage: for Powers usually inserted in Settlements of the like nature, must be proper for effecting the purposes of those Settlements. On the other hand, the Construction which we contend for, makes every part of the sentence consistent, sensible, and useful.

We submit that the word *and*, is to be taken in its correct sense, and that the latter part of the sentence controls the general language of the former, and that no Power can be introduced into the Settlement, unless it is both usual and proper for effecting the purposes mentioned in the Articles.

The VICE CHANCELLOR:

I do not think that there is much difficulty in this Case.

There is a palpable distinction between inserting in a Settlement, Powers for the management and better *enjoyment of the [*145] settled Estates which are beneficial to all Parties, and Powers which confer personal Privileges on particular Parties, such as Powers to Jointure, to raise Money for any particular purpose, &c. But Powers of Leasing, of Sale and exchange, and, where there is any joint Property, or there are any Mines, or any Land fit for building purposes, Powers of Partition, of Leasing Mines, and of granting Building Leases, are Powers for the general management and better enjoyment of the Estates: and such Powers are beneficial to all Parties.

It is not necessary, I think that *and* should be read as *or*, in that Clause of the Articles which has been so much commented upon by the Counsel on both sides. It appears, on the face of these Articles, that the framer of them was grossly ignorant of the Law: for he has attempted to give Estates for Life to unborn Children, and Estates Tail to their Issue. And, when I find that he meant to do more than the Law would allow, I am not to suppose that, by the general words he has used, he meant to do less than the Law would admit of. My opinion therefore, is that the Person who prepared these Articles, intended that any usual Power, Provision, Clause, Covenant or Agreement that would tend to the better enjoyment of the Estates, should be inserted in the Settlement, or, in other words, that the Clause in question should be taken as if it had stood thus: "And likewise all other Powers, Provisions, Clauses, Covenants and Agreements which shall be proper for effecting any of the purposes aforesaid, and which are usually inserted in Settlements of the like nature," which would include everything.

 1833.—*Aberdeen v. Watkin.*

[*146] *Declare that the Articles of Agreement authorize an insertion, in the Settlement to be made in pursuance thereof, of a Power of Sale and Exchange of the Hereditaments and Premises comprised therein, and that such a Power ought to be inserted in the said Settlement: order that the Exception, taken by the Plaintiffs to the *Master's* Report, be allowed: and that it be referred to the *Master* to review his Report so far as he thereby approves of the Draft of the Settlement therein mentioned, without containing such Power of Sale and Exchange.*

ABERDEEN *v.* WATKIN.

1833: 29th May and 5th June.—*Practice.*

The Order for confirming absolutely a *Master's* Report as to a Purchase, when served, operates from the day on which it was pronounced.

THE Order for confirming the *Master's* Report *Nisi*, as to the purchase of Lot 2 of the Estates sold in this Cause, was served on the 19th of April 1833. On the 1st of May, *James Moor*, instructed his Solicitors to move to open the Biddings: and they then learned, from the Solicitors for the Parties to the Suit, that the Order *Nisi* had been served more than eight days previously. In consequence of which, they, on the same day, sent a Letter to the Purchaser, informing him that *Moor* intended to move, on the 7th of that month, to open the Biddings, and that, in case any further Proceedings were taken for the purpose of confirming the Report, he would move to set them aside. On the 2d of May, *Moor's* Solicitors learned, on inquiry at the Registrar's Office, that the Brief of the Motion for confirming the Report absolutely, had *been left there three days before, and the Order be spoken, but that the same had not been drawn up; whereupon they immediately served the Purchaser, personally, with Notice of the intended Motion to open the Biddings.

Mr. *Jacob*, in support of the Motion, contended that the Order for confirming the *Master's* Report absolutely as to a Purchase, took effect from the time of Service, and not from the time when it was pronounced.

Mr. *Knight* for the Purchaser.

Mr. *Collins* for a Party in the Cause.

The *Vice-Chancellor* said that his Opinion was against the Motion, but that he would have the Practice inquired into.

On this day His *Honor* said that he had consulted the Registrar (Mr.

*See *Lindow v. Fleetwood*, post. p. 152.

1833.—Walter v. Makin.

Bedwell), and also Mr. *Jackson*, one of the Clerks in Court, and that they were both of opinion that the Order for confirming the Report absolutely, when it was drawn up and served, took effect from the day on which it was pronounced; and he refused the Motion with Costs.*

*WALTER v. MAKIN.

[*148]

1833: 11th June.—Will.—Construction.—Legal Representatives.

Testator gave 450*l.* to Trustees, their Executors, &c. in Trust for his Son for life, and after his Son's decease, to pay thereout two Legacies of 100*l.* each to two of his Daughters, and to pay the Residue to the legal Representatives of his Son. And he gave the Residue of his Personal Estate to his Son, his Executors, &c. Held that the words *Legal Representatives* meant Next of Kin.

JOHN HOMFRAY made his Will, dated the 17th of January 1804, as follows: "I give and bequeath unto *Isabella Thornley* the Sum of 10*l.*, also to *Benjamin Parker* the Sum of 20*l.* and all my working Tools, and I give to my Sister, *Ann Homfray*, the Sum of 10*l.*, and I give to my two Friends, *Joseph Osborne* and *Matthew Howe*, my Trustees hereinafter named, the Sum of Ten Guineas each. I give and bequeath, unto my said two Friends *Joseph Osborne* and *Matthew Howe*, the Sum of 450*l.*, to be paid to them within two months next after my death, upon Trust that they the said *Joseph Osborne* and *Matthew Howe*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do, as soon as conveniently may be, put and place out or invest the said Sum of 450*l.* upon Real Security, or in the Public Stocks or Funds, and pay the Interest or Dividends arising therefrom, from time to time, as the same shall become due and payable, unto my said Sister, *Ann Homfray*, or her Assigns, during her life; and upon further Trust, from and immediately after the decease of my said Sister, to call in the said Sum of 450*l.* so to be placed out as aforesaid, and, thereout, to pay the Sum of 20*l.* to the said *Benjamin Parker*, and the Sum of 10*l.*, to *Isabella Thornley*, and, from and after payment of the said two Legacies last mentioned, upon further Trust that they the said *Joseph Osborne* and *Matthew Howe*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do, as soon as conveniently may be, put and place out, or [*149] invest the residue of the said 450*l.*, upon Real Security, or in the Public Stocks or Funds, and pay the Interest or Dividends arising

* It did not appear, from the Brief, that the Order confirming the Report absolutely, had been served before the motion to open the Biddings was made.

1833.—Walter v. Makin.

therefrom, from time to time, as the same shall become due and payable, unto my Son, *John Homfray*, or his Assigns, during his life, and upon further Trust, from and immediately after the decease of the said *John Homfray*, to call in the residue of the said 450*l.* so to be placed out as aforesaid, and to pay, thereout, the Sum of 100*l.* to *Sarah Ann Homfray*, one of the Daughters of my said Son, *John Homfray*, and the further Sum of 100*l.*, to *Juliana Homfray*, the other Daughter of my said Son, *John Homfray*; and upon further Trust to pay the residue of the said Sum of 450*l.* then remaining, unto the legal Representatives of my said Son, *John Homfray*."

The Will then provided for the Indemnity and Reimbursement of the Trustees, and concluded in the following words:

"And as for and concerning all my Real Estate whatsoever, and wheresoever, and also all my Mortgages, and all my Estate, Right, Title and Interest in the Messuages, Lands, Tenements and Hereditaments comprised in such Mortgages, and all my Money, Securities for Money and other my Personal Estate and Effects, of what nature or kind soever and wheresoever, I give, devise and bequeath the same, (subject to and charged with the payment of all my just Debts, Funeral and Testamentary Expenses, and, also, with the payment of several Legacies hereinbefore by me given and bequeathed,) unto my said Son, *John Homfray*, his Heirs, Ex-
[*150] cutors, Administrators and Assigns, *absolutely, to and for his and their own use and benefit."

Osborne, after the Testator's death, invested the 450*l.* in the purchase Three per Cent. Reduced Annuities in his own name.

By an Indenture of the 20th of February 1808, *John Homfrey*, the Son, assigned the 797*l.* Stock to *Robert Cory*, subject to the Life Interest of *Ann Homfray*, and to the Legacies payable thereout. After the death of *Ann Homfray*, the Bill was filed by Persons claiming under *Robert Cory*, against *John Homfray* and his Wife and Children and certain other Parties, praying that it might be declared that the Plaintiffs were entitled to the Stock subject to the Legacies of 100*l.* and 100*l.*

Mr. Knight and *Mr. G. Richards*, for the Plaintiffs, contended that, under the Will, *John Homfray* the Son, became absolutely entitled to the Fund subject to the Life-interest of *Ann Homfray*, and to the payment of the Legacies with which it was charged: that the words "Legal Representatives," *prima facie*, meant "Executors and Administrators," though they might be held to mean Next of Kin, where the context of the Will required it: but, in the present Case, there was nothing to show that the words "Legal Representatives" were not to be taken in their proper and ordinary

1835.—*Lindow v. Fleetwood.*

sense: *Bulmer v. Jay* (a); *Saberton v. Skeels* (b); *Price v. Strange* (c): that the Life-interest given to *J. Homfray* *was [*151] separated from the Reversion, in order to admit the provision for his two Daughters after his death: that the Testator, having so provided for two of his Son's presumptive Next of Kin, could not mean the words "Legal Representatives," to be taken in the sense of Next of Kin.

Mr. *Pepys*, Mr. *Barber*, Mr. *Cooke* and Mr. *S. T. Preston*, appeared for the Defendants:

But the VICE-CHANCELLOR, without hearing them said:

I cannot put the construction, which the Plaintiffs have contended for, on the words "Legal Representatives." For it is clear, on the face of the Will, that the Testator meant to use those words in a different sense from "Executors and Administrators," which latter words occur, several times, in the Will, and, especially, in the Gift of the residue to the Son: and, moreover, the effect of putting that construction on the words, would be to make the ~~Sea~~ partial Residuary Legatee so far as the 450*l.* is concerned, and also general Residuary Legatee of the Personal Estate.

Declare that the words "Legal Representatives" mean Next of Kin*.

*LINDOW v. FLEETWOOD.

[*152]

1335: 31st March.—Rolls.—Will.—Construction.—Power to appoint new Trustees.

Testator directed his Real Estates to be settled on certain Persons in strict settlement, and that there should be inserted, in the Settlement so to be made, Powers of Lending, Sale, Partition, and Exchange. "And my Will is that, in such intended Settlement, shall be inserted all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature." Held that a Power to appoint new Trustees, was a proper and reasonable Power to be inserted in the Settlement.

WILLIAM LINDOW, Esquire, by his Will, after charging his Real and Personal Estates with the payment of his Debts and Funeral Expenses, devised, to Trustees and their Heirs, all his Messuages, Lands, Tenements, Hereditaments and Real Estates in *England*, and also his parts and Shares of and in certain Estates or Plantations in the Island of *Grenada*, and *St. Vincent's* in the *West Indies*, upon Trust, within 12 calendar months after his decease, to settle certain parts thereof, in the most effectual manner taking the advice of Counsel thereon, so as that an Annuity of 50*l.* might be charg-

(a) *Ante*, vol. IV. p. 43.(b) 1 *Russ. & Myl.* 587.(c) *Madd. & Gold.* 159.* See *Robinson v. Smith*, *ante*, p. 47, and *Styth v. Monro*, *ante*, p. 49.

1835.—*Lindow v. Fleetwood.*

ed upon a competent part thereof, and be paid to his Sister *Ellinor*, the Wife of Mr. *James Jackson*, for her separate use, and, subject as aforesaid, the Testator declared that the same Hereditaments and Real Estates should be settled, limited and assured to the use of his Children and Child by his Wife *Abigail*, as she should by Deed or Will appoint, and, in default thereof and subject thereto, to the use of all and every his said Children as Tenants in Common in Tail, with Cross Remainders between them in Tail, and, for default of such Issue, to the use of the Trustees and their Heirs, during the life of his Wife *Abigail*, in Trust to pay the Rents to her, during her life, for her separate use, and, after her decease, to the use of any one of the Sons of *Henry Rawlinson*, the Brother of his Wife, and his Issue in Tail Male, and, for want of such Issue, to any one of the Daughters of *Henry Rawlinson*, and her Issue in Tail Male, with remainders over to

[*153] any others of the Children of *Henry Rawlinson*, "one after another, and their Issue in Tail Male as the Testator's Wife, by Deed or Will, should appoint; and, in default thereof, to the use of the Trustees and their Heirs, during the life of the Plaintiff *Henry Lindow Lindow*, then *Henry Lindow Rawlinson*, Son of *Henry Rawlinson*, in Trust to pay the Rents thereof to the Plaintiff, for his life, and, after his decease, to the use of his first and other Sons successively in Tail Male, with remainder to his Daughters as Tenants in Common in Tail, with Cross Remainders amongst them in Tail, with divers remainders over, and the ultimate remainder to the use of the Testator's right Heirs. The Testator directed other parts of his Estates to be settled on his Nieces and their Children, in strict settlement; and, in a subsequent part of the Will, the following Clause was contained :

" And my will and mind is, and I do hereby direct that, in the said several Settlements to be made as aforesaid, there shall be respectively inserted proper Powers to enable the several Tenants for Life therein to be named, when respectively in possession, and also the Trustees to uses to be named in such Settlements, during the Minority of any Person or Persons who, by virtue of the Limitations therein to be contained, shall be entitled to any Estate of Freehold or Inheritance of or in any of the Estates to be comprised in such Settlement or Settlements, and also the Trustees for my said Wife and her Nephews, to make Leases for years of the said Estates to be comprised in such Settlements, or any part or parts thereof, not exceeding 21 years in possession, reserving, from time to time, the greatest annual Rent that may be reasonably had for the same, without taking

[*154] any Fine, or anything in the nature of a Fine or Premium for the making any such Lease or Leases, and also a Power for the Trustees to uses in such Settlements to be respectively named, with the con-

1833.—Blanchard v. Cawthorne.

sent of the Tenant for Life in Possession, or the Person entitled to the Rents and Profits for his or her life, to make Sale or Partition of, or to exchange any of the Messuages, Lands, Tenements or Hereditaments which shall be comprised in such Settlements, for other Messuages, Lands or Hereditaments of equal value: and my will is that, in such intended Settlements, shall be inserted *all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature.*

The question was whether the concluding words of the above Clause, authorized the insertion of a Power to appoint new Trustees, in the Settlements to be made in pursuance of the Will.

Mr. *Spence* and Mr. *Walker* for the Plaintiffs.

Mr. *Simons* and Mr. *L. Lowndes* for the Defendants.

The *Master of the Rolls* said that, taking the Clause relating to the Powers to be inserted in the Settlements to be as the Bill stated it*, he doubted whether the general words would authorize the insertion of the Power in question, or of any other Power that was not *of the [*155] same nature as those specifically mentioned. But his *Honor* added that he had referred to the Will, and, as he found that those general words were contained in a separate and distinct sentence, he was of opinion that they would authorize the insertion of a Power to appoint new Trustees in the Settlement to be made in pursuance of the Will †.

BLANCHARD v. CAWTHORNE.

1833: 31st January, 23d May & 12th June.—*Injunction.*

A Receiver having been appointed, in a Creditor's Suit, of the office of Master Forester of a Royal Forest, an Injunction was afterwards granted to restrain certain Persons who owned Lands in the Forest, from Sporting in it.

GEORGE NOBLE, having been appointed the Receiver, in pursuance of the Order made on the Motion in this Cause, (reported *ante*, Vol. IV. p. 566,) with liberty to manage, set and let the Grants, Deputations and Demises, with the approbation of the *Master*, he, in June 1832, advertised the exclusive right of Sporting over the Forest of *Wyersdale* to be let, and that the

* The Clause was thus stated in the Bill: "And the said Testator, after directing certain Powers of granting Leases of his said Estates, and also of Sale, Partition, and Exchange of the same, to be inserted in the said intended Settlements, directed that there should also be inserted therein, all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature."

† See *Hill v. Hill*, *ante*, p. 126.

 1833.—*Blanchard v. Cawthorne.*

Terms might be known on application to him, the Receiver of the Rents of the Forest appointed by the Court of Chancery.

On the 5th of August 1832, *J. Bradshaw Hathornthwaite*, an Owner of Lands in the Forest part of the Vaccary of *Leigh*, offered to give the Receiver 180*l.* for the right of Sporting in the Forest for the Season, but, afterwards, he retracted his offer, and the Receiver, but without the sanction of the *Master*, let to other Persons, the exclusive right of Sporting over the Forest.

In October 1832, *J. Bradshaw Hathornthwaite* having been [*156] found Sporting in the Forest, one of the Lessees *served him with a Notice, signed by the Receiver, stating that the right of Sporting over the Forest had been let for the Season, and that if any Person should be found Sporting in it, without the Receiver's authority, application would be made, to the Court of Chancery, for his Committal to the *Fleet*, for a Contempt. *Hathornthwaite* disregarded the Notice, and repeatedly afterwards Sported in the Forest: whereupon the Plaintiffs served him with a Notice of a Motion for his Commitment to the *Fleet*, and for an Injunction to restrain him from Sporting in the Forest. The Motion was supported by an Affidavit made by the Receiver and other Persons, stating the facts before mentioned, and verifying the Grants made to *Cawthorne*, and the Deputations which had been made by him from time to time, and stating that he had always exercised, and enforced when necessary, the exclusive right of Sporting in the Forest.

Mr. *Knight* and Mr. *James Russell*, appeared in support of the Motion; but no Counsel appeared for *J. B. Hathornthwaite*.

The *Vice-Chancellor* ordered that he, having personal notice of the Order, should, on the 21st of February, show Cause why he should not be committed to the *Fleet* for Sporting, pursuing and killing Game in the Forest, Chase, Manor or Lordship of *Wyersdale*, with full Notice and in violation of the Order for the appointment of the Receiver; and that he should be restrained from Sporting in the Forest, Manor or Lordship, or pursuing, or killing, or attempting to kill any species of Game within the Limits thereof, or from doing any act to disturb or impede the Receiver or his Agents, or [*157] any Person acting under his License or Authority, or *to whom he might make Grants, Deputations, or Leases, in the full possession and exercise, so far as related to the said Forest, Chase, Manor or Lordship, or the Lands therein included, of any of the Rights and Privileges granted by the Letters Patent.

On the 21st of February 1833, the Order for the Committal of *Hathornthwaite*, was made Absolute, on an Affidavit that the same had been served upon him personally.

1833.—Blanchard v. Cawthorne.

On this day a Motion for an Injunction, similar to that which had been obtained against *J. B. Hathornthwaite*, was made, by the Plaintiffs, against *John Walmsley*, and his son, *John Walmsley Hathornthwaite*, who was the Owner of the remainder of the Vaccary of *Leigh*.

Several Affidavits were filed in opposition to this Motion, stating that the Rights and Powers claimed by *Cawthorne*, had been subject to disputes for upwards of 20 years : that the Owners of Lands in the Forest, and others with their permission, had, for several years, Sported over their Lands in the Forest, and had refused to permit *Cawthorne* and his Freinds to Sport over the same : that *Cawthorne* commenced an Action against one of the Deponents, for having killed Game in the Forest, but did out proceed with it, and the same was *non prossed* by the Deponent, who afterwards continued to Sport in the Forest, without any interruption from *Cawthorne* : that *Wyersdale* was not a Forest in law, nor were those Forestal Rights belonging to it which were claimed on behalf of the Patentee of the Duchy of *Lancaster* : That, by 16 Charles I., c. 16, s. 5, it was enacted that no Place or Places within the Realm *of *England* or dominion of *Wales*, [*158] where no Justice-seat Swainmote or Court of Attachment had been held or kept, or where no Verderers had been chosen, or regard made within the space of 60 years next before the first year of his then Majesty's reign, should be, at any time thereafter, judged, deemed or taken to be Forest, or within the bounds or metes of the Forests, but the same should be, from thenceforth, disafforested and freed and exempted from the Forest Laws, any Justice-seat, Swainmote or Court of Attachment held or kept within or for any such Place or Places, at any time or times since the beginning of his said Majesty's reign, or any presentment or inquiry, act or thing theretofore made, or thereafter to be made or done to the contrary, notwithstanding. The Affidavits further stated that, as Deponents believed, neither a Justice-seat had been held or kept, nor had Verderers been chosen, or regard made within the period or the terms specified in the said Act of Parliament : That *Richard Hathornthwaite* (the former Owner of the Lands belonging to *J. B. Hathornthwaite* and *John Walmsley Hathornthwaite*) kept Harriers, and hunted over his Estates and other parts of the Forest, and was never interrupted in so doing by *Cawthorne*, except that, in the year 1786, *Cawthorne's* Gamekeeper, by his instructions, shot several of *Richard Hathornthwaite's* Dogs, upon which he brought an Action and recovered a Verdict against the Gamekeeper, and, afterwards, continued to kill Game in *Wyersdale*, without interruption.

The Affidavits in reply stated that in 1812, Mr. *Lawson*, the then Proprietor of one of the other Vaccaries in the Forest, claimed the right of

1834.—Knight v. Knight.

Free Warren over that Vaccary, under Letters Patent granted by [*159] King James I. ; and that an action of Trespass for *entering that Vaccary and killing and carrying away Game therein, was commenced, in the name of the Tenant, against *Cawthorne's* then Gamekeeper : that the Defendant pleaded, in justification, the Letters Patent granted to *Cawthorne*, and that he was deputed and constituted *Cawthorne's* Deputy Gamekeeper ; that the Plaintiff, by his Replication, pleaded the Letters Patent of James I., and claimed, thereunder, the right of Free Warren : that, in 1813, the question was argued before the Judges of the King's Bench, who were unanimously of opinion that the right of Free Warren did not pass by the Letters Patent of James I., and ordered the Verdict to be entered for the Defendant : that *Richard Hathornthwaite* succeeded in his Action, by reason of the Gamekeeper not being able to prove his Deputation : that the Forester for the time being of *Wyersdale*, or his Steward, had, from time to time, held Courts in the Forest intituled ; “ Forest of *Wyersdale* in the County of *Lancaster* (to wit), the Forest Court, Court Leet and View of Frankpledge, with the Court Baron and Swainmote of our Sovereign Lord the King.”

Mr. *Knight* and Mr. *James Russell*, in support of the Motion.

Mr. *Agar* and Mr. *Duckworth*, for *John Walmsley* and *John Walmsley Hathornthwaite*.

The *Vice-Chancellor* granted an Injunction in the terms of the Notice of Motion, and ordered the Parties to proceed to a Trial at Law, at the then next Summer Assizes for the County of *Lancaster*, on the following Issues : First, whether a certain Place or District called *Wyersdale*, in the County

of *Lancaster*, or any part thereof, was or was not a Forest belonging to his Majesty, *in right of his Duchy of *Lancaster* :

[*160] Second, whether a certain Place or District called *Wyersdale*, &c. was or was not a Chase belonging to His Majesty, in right of his Duchy of *Lancaster* ; and the Plaintiffs in the Cause, were to be Plaintiffs at Law, and *J. Walmsley* and *J. Walmsley Hathornthwaite* were to be Defendants at Law : Third, whether *J. Walmsley* and *J. W. Hathornthwaite*, or either of them, were or was entitled to Free Warren in the Vaccary of *Leigh* or any part thereof : Fourth, whether they, or either of them, were or was entitled to kill Game in that Vaccary or any part thereof : and *J. Walmsley* and *J. W. Hathornthwaite* were to be Plaintiffs at Law, and the Defendants in the Cause were to be Defendants at Law : and, in case any special matter should arise on the Trial of any of the Issues, it was to be indorsed on the *postea*.*

* A Motion to discharge the above Order was refused by Lord Brougham, C., on the 13d August 1833.

1883.—*Blanchard v. Cawthorne*.

On this day, a Motion was made on behalf of *J. Bradshaw Hathornthwaite*, to discharge the Orders made against him.

Mr. *Agar* and Mr. *Duckworth*, in support of the Motion, read the Affidavits made in opposition to the preceding Motion.

Mr. *Knight* and Mr. *James Russell* opposed the Motion.

The *Vice-Chancellor* directed Issues to be tried similar to those in the preceding Order, and suspended the execution of the Order of Committal in the meantime*.

* None of the Issues were tried.

END OF PART I. VOL. IV.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

HOWARTH AND OTHERS v. SMITH.

1833 : 8th February.—*Vendor and Purchaser.*— *Title.*

Testator by his Will, in his own hand-writing, devised an Estate to *Ann Aspinall* and her Heirs, if she should be then living ; but, if not, then to her Issue and their Heirs. He afterwards made a Codicil commencing thus : “ This is a Codicil to the last Will and Testament of me, *J. S.*, and which Will I sometime since made in my own hand-writing, and thereby devised to *John Aspinall* as therein mentioned.” At the date of the Codicil, *Ann Aspinall* had a Son named *John*. Part of the Testator’s Estates having been sold in pursuance of a direction in the Will, the Purchaser objected to the Title on the ground that the reference in the Codicil afforded strong presumption of the existence of a subsequent Will. But, as the Will contained a Gift which might take effect in favour of *John Aspinall*, the objection was over-ruled.

THIS was a Suit by Vendors to compel specific performance of a Contract for purchase of a Freehold Estate, devised by the late Owner, *John Swinglehurst*, by a Will, dated 13th February 1811, but, which the Defendant alleged was not the Will referred to by a subsequent Codicil of the Testator, and therefore was not his last Will.

By the Will of 1811, the Testator gave all his Real and Personal Estates, subject to the payment of his Debts and Funeral and Testamentary [*162] Expenses, unto and to the use of the Plaintiff, *Richard *Howarth*, and *Shackleton Midgley*, and the Survivor of them and his Heirs, upon and for the Trusts and Purposes aftermentioned (that is to say) upon Trust that the Trustees and the Survivor of them should pay an Annuity of 60*l.* to the Testator’s Sister, *Elizabeth Hoyle*, for her life, and, after her death, to her Children and their Issue, and, unto *Isabella* the Daughter of *Benjamin Spencer*, an Annuity of 60*l.* while she should continue unmarried ; and, unto *Mary Swinglehurst*, the Daughter of the same *Isabella* and also

**Ex Relatione* Mr. Greening.

1833.—Howarth and Others v. Smith.

the Testator's Daughter, during her life, an Annuity of 60*l.*: and the Testator willed that the same *Isabella* and *Mary* should have the use of the House, Lands, Stock and Household Effects in his own possession and occupation at the time of his death, during their lives and the life of the longer liver of them, but, if *Isabella* should marry, that she should lose her right therein, and that the Income of the rest, during his Daughter's Minority, should be applied in discharge of the other of his Debts, Legacies and other Payments, at the discretion of his *Executors*: and all the Residue of the Testator's said Estates and Effects (subject to all the same Payments and also to the Legacies thereafter mentioned) unto his same Daughter *Mary*, during her life, and, afterwards, to her Issue living at her death, in manner in the Will mentioned, and for want of such Issue, to the Testator's said Sister *Hoyle*, for her life, and, upon her death, to her Issue who should be then living, for want of such Issue, the Testator willed that all his Property should be given, and he gave the same to *Ann otherwise Nanny Aspinall*, his Cousin, the Wife of *Henry Aspinall, Esq.* if she should be then living, and to her Heirs and Assigns for ever: if she should be then dead, the Testator gave, devised and bequeathed the same to "her [*163] Issue or Issues, in the same manner as to *Mrs. Hoyle's* Issues, and to their respective Heirs for ever. And, after bequeathing some Legacies and Annuities, the Testator willed that it should be lawful for his said Trustees and Executors thereafter named, at any time during the Minority of his Daughter, if necessary, to mortgage some sufficient part of his said Lands, Tenements, Hereditaments, and Premises, and, after her attaining the age of 21 years and deliberately considering what part or parts thereof, and the said Trustees believing it expedient so to do, to sell the same part or parts so fixed on, and their Receipts to be sufficient Discharges for the Purchase-money, in order to raise Money to pay his Debts and the Annuities and Legacies given by his Will. And the Testator appointed *Howarth* and *Midgley*, his Trustees for the uses of his Will, and appointed his said Daughter and *Howarth* Executrix and Executor thereof.

Midgley, one of the Trustees appointed by the Will, died soon after its date.

On the 11th March 1827, *John Swinglehurst* made a Codicil to his Will in the form following: "This is a Codicil to the last Will and Testament of me, *J. Swinglehurst*, of, &c. and which Will I sometime since made in my own hand-writing, and thereby gave, devised, and bequeathed to *John Aspinall* and his Heirs as therein mentioned, which Gift and Devise I do hereby make null and void, as if the same had not been inserted and contained therein, and I do hereby direct that the Person and Persons who shall then be entitled, shall stand seised of the same subject to the same

 1833.—Howarth and Others v. Smith.

Limitations and Directions as the said *John Aspinall* and his
 [*164] Heirs stood seised of them. I do, hereby, give *and bequeath,
 unto *J. H. Spencer*, who now resides with me, an Annuity of
 10*l.* during the term of his natural life, and I do hereby charge my Real
 and Personal Estates with the payment of the same. I do hereby ratify
 and confirm my said Will in every particular thereof that is not hereby al-
 tered or revoked.”

The Will of 1811 was in the hand-writing of the Testator ; the Codicil
 was in another hand.

Isabella Spencer died in the Testator's lifetime, and his Daughter became
 of age and married *Christopher Grimshaw* in the Testator's lifetime ; but
 whether those events happened before the date of the Codicil, did not ap-
 pear. The Testator died in August 1830.

Ann Aspinall survived the Testator, and, at the time of his death, was
 a Widow and had two Children, namely, *John Aspinall* and *Elizabeth*
Greenwood, both of whom were adult.

The Testator's general Personal Estate being insufficient to pay his
 Debts, &c., *Howarth*, the surviving Trustee of the Will, with the consent
 of Mrs. *Grimshaw*, agreed to sell part of the Testator's Real Estates to
 the Defendant *Smith*.

The Purchaser objected to the Title on two grounds: First, that the
 Codicil referred to a disposition not contained in the Will of 1811, and,
 therefore, showed that the Testator had made another Will, or, at all events,
 raised so strong a presumption that another Will existed as to render the

Title under the Will of 1811 doubtful and unmarketable. Second,
 [*165] that the power of Sale *given by the Will to the Trustees, did
 not survive to *Howarth*.

In a Suit of *Grimshaw v. Howarth and others*, subsequently instituted,
 in Chancery, for the Administration of the Testator's Assets, the Will and
 Codicil were declared to be well proved ; and the Master having reported,
 upon a reference made to him in that Suit, that it would be for the benefit
 of the Parties interested in the Testator's Estates that a Suit should be in-
 stituted to compel the Defendant *Smith* to complete his Contract, the present
 Suit was instituted for that purpose.

Sir *Edward Sugden* and Mr. *Barber* for the Plaintiffs, said it was clear
 that the Codicil referred to the Will of 1811 ; for though that Instrument
 contained no Devise to *John Aspinall*, by name, yet it contained a limitation
 to the Issue of *Ann Aspinall*, under which he would be entitled to take :
 that the Will of 1811 had been established ; and, though the Testator had
 been dead for three years, it had never been pretended that any other Will

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existed. *Sperling v. Trevor* (a). As to the second objection they relied on an unreported Case, *Hall v. Davis*, decided by Lord Eldon in 1827, as conclusive.

Mr. Preston and Mr. Greening for the Defendant, said that the Case must be determined by an application of the rules of Equity with regard to doubtful Titles. That a Purchaser shall not be compelled to accept a doubtful Title, is an admitted rule, and is established on incontrovertible reasons, and yet it is "one which has never been analysed or explained, [*166] *Price v. Strange* (b); and, therefore, its application has been uncertain, and the rule itself has been objected to, even by high authority. In truth, the term "doubtful Title" has been improperly confined in the Books; for it has not always been applied to Cases turning upon doubts which it was competent to the Courts to remove. From consideration of principle, and from a review of the Cases, it is manifest that doubtful Titles are of three kinds; the first being where the doubt is respecting the existence of an alleged rule of Law or Equity; the second being where the doubt is only respecting the application, in the particular instance, of a general rule, the existence of which is admitted, and of this kind are obviously all Cases of Construction; and the third being where the doubt is respecting a fact. In Cases of the first class, it is in the power of the Court (for the Law speaks by the Judge) to remove the doubt, and hence it has often happened that, when a Case of this kind has been reported, the doubt having been removed, the Case has not been referred to as one of doubtful Title. In Cases of this class, the Court has generally and rightly compelled Purchasers to accept Titles originally doubtful; as in *Moody v. Walters* (c); *Biscoe v. Perkins* (d); *Pearson v. Lane* (e); *Smith v. Death* (f); *Hasker v. Sutton* (g); *Adams v. Taunton* (h); *Howard v. Ducane* (i). But there are Cases even of this first class, in which a Purchaser has not been compelled to take the title; as *Blosse v. Clanmorris* (k); and *Playford v. Hoare* (l). Deci- [*167] sions which it is difficult to account for otherwise than by a supposition that the Cases of the first and second classes were not distinguished. Lord Eldon took a part in the former Decision, and it would, perhaps, be too much to say that the rule was not understood by him; but, that he was under a misconception with regard to its origin at least, is apparent from his observations in *Jervoise v. The Duke of Northumberland* (m), contrasted with those of Sir Wm. Grant in *Sloper v. Fish* (n). In Cases of the first

(a) 7 Ves. 497.

(d) 1 Ves. & Bea. 485.

(g) 2 Sim. & Stu. 513.

(k) 3 Bli. 62.

(n) 2 Ves. & Bea. 149.

(b) Madd. & Geld. 159.

(e) 17 Ves. 101.

(h) 5 Madd. 435.

(l) 3 You. & Jerv. 175.

(c) 16 Ves. 283.

(f) 5 Madd. 371.

(i) 1 Turn. & Russ. 81.

(m) 1 Jac. & Walk. sec p. 565-9.

1833.—Howarth and Others v. Smith.

kind it is perfectly immaterial between what Parties the question arises, because the Law is determined without reference to any one Case more than another. Not so however in Cases of the second or third classes; for, in these, it would be contradictory to the universal principles of Justice and to the rules of Courts of Equity, to pronounce *final* Decisions upon the points in doubt; since, if this were done, the rights of absent Parties would be bound or destroyed, without their having any opportunity to defend them: but it is obvious that, without such final Decisions, no Security could be given to the Purchasers, who would be left exposed to litigation with all Persons not Parties to the original Suit. The consequence is that, in all Cases of this kind, a Purchaser ought to be, and is relieved from the acceptance of the Title upon which the doubt exists. As Cases of the second kind may be cited *Marlow v. Smith* (o); *Shapland v. Smith* (p); *Cooper v. Denne* (q); *Sheffield v. Lord Mulgrave* (r); *Roake v. Kidd* (s); [*168] *Wheate v. *Hall* (t); *Sloper v. Fish* (u); *Price v. Strange* (x); *Willcox v. Bellaers* (y); *Sharp v. Adcock* (z); and we may refer to the observation of C. B. *Alexander in Colmore v. Tyndall* (a). Perhaps, however, *Sloper v. Fish* may be considered rather as an exception to the general rule of decision in Cases of the first kind; for, although upon the facts, and upon the particular doubts stated by Sir Wm. Grant in the commencement of his Judgment, the determination must have been the same, yet he seems to have rested his Judgment upon more general grounds. And it may be doubted whether *Price v. Strange* also ought not to be referred to as a Case of the first description; although the only result of this would be to determine, that, where even a general question of Law is exposed to so much doubt that it is obviously impossible to set it at rest by a single decision, there, as between Vendor and Purchaser, a question of the first class is treated in the same manner as one of the second or third class.*

(o) 2 P. Wms. 198.

(p) 1 Bro. C. C. 75.

(q) 1 Ves. J. 565.

(r) 2 Ves. J. 526.

(s) 5 Ves. 647.

(t) 17 Ves. 80.

(u) 2 Ves. & Bea. 145.

(x) 6 Madd. & Geld. 159.

(y) 1 Turn. & Russ. 491.

(z) 4 Russ. 374.

(a) 2 You. & Jerv. 617.

* The Reporter is indebted to Mr. *Greening* for the following Note:

There are two Cases which might have been adverted to as opposed to the current of these Decisions; *Jenkins and others v. Herries*, 4 Madd. 67, and *Rushton v. Craven*, 12 Price, 599.

In the former Case, for the words "Decree a Specific Performance," (4 Madd. 62) should be read "Overrule the Exception."

The Defendant afterwards appealed to the House of Lords against the Order. The Appeal was heard 10 Feb. 1821. Lord *Ellenborough* said that, as the Judgment of the House on that Appeal, could not bind any Issue which *Thomas Jenkins* might thereafter have, but such Issue might, at a future period, contest the question with the Purchaser, he considered that, before the House should be called to give its final Judgment, the Court of Chancery should decide, by a Decree, whether the Title was so clearly good and marketable as to be binding against an unwilling Pur-

1833.—Howarth and Others v. Smith.

*In Cases of the third class there are additional reasons for [*169] the course which has been adopted by the Courts ; since, in these Cases, it is scarcely possible to pronounce a final Judgment between any Parties ; for the facts which appear may be rendered nugatory by the disclosure of others. Hence, in every Case of this kind, the Purchaser has been discharged from his Contract. *Lowes v. Lush* (b) ; *Franklin v. Lord Brownlow* (c) ; *Stapylton v. Scott* (d) ; *Hartley v. Smith* (e) ; *Cann v. Cann* (f) ; see also the observations of Lord Eldon, in *Lord Braybrooke v. Inskip* (g). The present Case does not arise out of any question respecting the existence of a general rule of Law or Equity, nor upon any question as to the application of an admitted rule ; but it depends, simply, upon a question of Fact, namely, *whether *John Swinglehurst* did [*170] or did not make another Will than that of 1811 ? This Codicil raises at least a presumption that he did ; and, that he did not, is no more capable of proof than was in *Lowes v. Lush*, the fact that there was no Debt to support a Commission of Bankruptcy. This Case, therefore, is clearly one of the third class, and the Plaintiff's Bill must be dismissed. *Sperling v. Trevor*, cited for the Plaintiffs, has no application ; for, in that case, there was nothing to create a doubt, and it was decided upon the ground that no doubt existed ; and, had the Decision been otherwise, every Title to an Estate in Remainder must have been held doubtful.

The second Objection was not urged by the Defendant's Counsel.

THE VICE-CHANCELLOR :

It is admitted that, at the time when the Testator made his Codicil, *Ann Aspinall* had a Son named *John*. Now the Will contains a Devise to *Ann Aspinall*, (if she should be then living) and her Heirs ; and if she should be then dead, to her Issue and their Heirs : and, consequently, the Will contains a Gift that may take effect in favour of *John Aspinall* : and, that being so, I am of opinion that the Codicil does refer to the Will that has been produced. If the Codicil had referred to a Person who did not take under the Will, that might have been a good ground of objection ; but, as I find,

chaser ; and, if the Court should decide in the Affirmative, and decree a Specific Performance, then the House of Lords must give its final Judgment on the subject ; but if in the Negative, it might be unnecessary for the House to decide the question.

An Order was made, on the 14th Feb. 1823, directing the Appeal to stand over until the Cause had been heard on Further Directions in the Court below, with liberty to the Parties then to apply to the House as they might think fit. And, in *Rushton v. Craven* the declaration that the Purchaser was bound by the opinion of the Court, avoids altogether the real difficulty. See *Sir John Leach's* concluding Observations in *Sharp v. Adcock*. This Suit was an amicable one, and the Case subsequently granted was with the Purchaser's consent.

(b) 14 Ves. 547.

(c) Ibid. 550.

(d) 16 Ves. 272.

(e) Buck. 368.

(f) 1 Sim. & Sta. 234.

(g) 8 Ves. see p. 428. et seq.

 1833.—*Prestwidge v. Groombridge.*

in the Codicil, a reference to the Will, it is not sufficient to say that there may be another Will.

Declare that there is no objection to the Title in respect of the reference in the Codicil to the Will that has been produced.

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*PRESTWIDGE v. GROOMBRIDGE.

1833: 7th May.—*Will. Construction.*§

Testatrix directed the Interest of her Residuary Estate to be applied in defraying the Expenses of the Education of her Nephews *George* and *Charles*, and the Principal to be applied either in binding them Apprentices at the age of 14, or to be reserved till they attain 21, to commence Business. "In the event of *George* and *Charles* (both or either of them) being settled before this Will comes in force, I provide that the next Boy (*James* or *Henry*) have the Benefit, and so on." *George* and *Charles* survived the Testatrix, but died under 21; held that *James* and *Henry* were entitled to the Residue.

MATILDA FRANCES PRESTWIDGE, made her Will, dated the 25th of November 1814, as follows: "Having, by the blessing of God upon my humble endeavour discharged my Debts that I had contracted over and above my Bond Debts, and having also paid off some Instalments upon these, thereby realizing Property that I feel a right to dispose of, I am encouraged to draw up this my last Will and Testament, trusting that my wishes will be binding upon my Executors, though not expressed agreeably to forms of Law. After a few Legacies (to be named hereafter), I request that my Effects may be sold, and the Sum arising from thence be funded; the Interest thereof to be paid to my Father, quarterly, during his life: at his death I should wish it to be applied as follows: the Interest to defray the Expenses of my Nephews *George* and *Charles Prestwidge's* Education: that end answered, the Principal to be employed to set them out in the world, either to bind them Apprentices at the ages of 14, or to be reserved till they attain to 21 years to commence Business, as it shall be deemed most advantageous by my Executors, whose judgment will be guided by the bent of the Boys' dispositions, and the situation of their Father at the time when they shall be called upon to decide. *In the event of the elder Boys,*

[*172] *Geo. and Charles (both or either of them) being settled before this Will comes in force, I provide that the next Boy (James or Henry) have the benefit, and so on.* The above Legacy comprehends (I conceive) Household Furniture, Linen, Plate, Books. The Lease of my House to remain in Mr. *Groombridge's* hands till my Bond Debts are paid off; Mr. *Groombridge* to receive the Rent, and, after paying the Instalment and In-

1833.—*Prestwidge v. Groombridge.*

stalments due to Messrs. *Paxton, Godfrey, Kirk*, and himself, to give the overplus to my brother *Geo. Prestwidge*, to whom I bequeath the Lease of the House as soon as the Claims of the above Gentlemen upon it are satisfied." And, after giving certain specific Legacies, the Testatrix expressed herself as follows: "It now only remains to name my earnest desire that Mr. *Stephen Groombridge* and Mr. *Josh. Ranking* will see this my last Will and Testament punctually fulfilled according to their own understanding and judgment, desiring that their decision may not be questioned or set aside."

The Testatrix died in December 1814; and, a Suit having been instituted by her Father, for the Administration of her Estate, the Court ordered that the Interest of the Bank Annuities purchased with the Residue of her Estate, should be paid to her Father during his life, or until further order, and declared that the Testatrix's Nephews, *George Prestwidge* and *Charles Prestwidge*, (who were Infants), would, upon their Grandfather's decease, and on their attaining 21, be equally entitled to the Bank Annuities.

The Testatrix's Father died in December 1819. By an Order of the 10th of April 1821, the Dividends of the Bank Annuities were ordered to be paid to the *Grandmother of the Infants (their [*173] Father being resident Abroad) for their Maintenance and Education during their minorities.

George Prestwidge died in May 1825, and *Charles Prestwidge* in May 1829, both of them being under 21.

In May 1831, *James Prestwidge* filed a Supplemental Bill against his younger Brother *Henry Prestwidge*, an Infant, *George Prestwidge* the Brother and Next of Kin of the Testatrix, and *Groombridge* the acting Executor, alleging that, on the death of the Survivor of *George* and *Charles Prestwidge*, he became entitled, under the Will, to have transferred to him the whole of the Funds to which they were, by the Decree, declared to be entitled on their attaining 21, and that his Brother, *Henry*, was not entitled to any Share of those Funds; and that the Testatrix had not (as the Defendant *George Prestwidge* pretended) died Intestate, in the events which had happened, as to those Funds.

The Supplemental Suit now came on to be heard as a short Cause.

Mr. *Knight* and Mr. *Blunt*, for the Plaintiff, said that this Case fell within *Jones v. Westcomb* (a); *Gulliver v. Wickett* (b); and *Murray v. Jones* (c); and that it was clearly the Testatrix's intention that, on failure of the Gift to *George* and *Charles*, *James* should take.

Mr. *Teed*, for the Defendant *Henry Prestwidge*, relied on the words, "I promise that the next Boy, (*James* or **Henry*) have [*174] the benefit, and so on;" and said that the Testatrix had provided

(a) 1 Eq. Ab. 246.

(b) 1 Wills. 105.

(c) 2 V. & B. 313.

1833.—*Meux v. Bell.*

for more than one failure, and that she meant that if *George* should be settled, but not *Charles*, *James* should be substituted for him, and, if *Charles* should be settled, that *Henry* should take his place.

Mr. *Wright* for the Defendant, *George Prestwidge*, the Testatrix's Brother, and Next of Kin, contended that, in the events that had happened, the Residue was undisposed of by the Will.

Mr. *Gurney* for the Defendant *Smith*, who was the Executor of *Groombridge*, who died pending the Suit.

The *Vice Chancellor* said, that *James Prestwidge* could not, consistently with his Claim, rely on the literal construction of the words of the Will; that the intention of the Testatrix was to make a Provision, out of the Fund, for two of her Brother's Sons, and, if the Provision failed as to either *George* or *Charles*, that *James* should be supported out of it, and, if it failed as to both of them, then that *Henry* should be supported out of it.

Declare that the Defendants, *James Prestwidge*, and *Henry Prestwidge*, the Infant, are entitled, in equal Moieties, to the Funds in question in the Cause.

[*175]

*MEUX v. BELL.

1833: 8th June.—*Interpleader*.—*Demurrer*.

A Bill of Interpleader is not demurrable, because it does not offer to bring the Money claimed into Court. But the Plaintiff must bring it in, before he takes any step in the Cause.

THIS was a Bill of Interpleader, offering to pay the Money claimed by the Defendants, to such of them as the Court should direct. One of the Defendants demurred, on the ground that the Bill ought to have offered to pay the Money into Court.

Sir *E. Sugden* and Mr. *Bethell*, in support of the Demurrer, said that the Money ought to be brought into Court, in order that it might be ready to be paid to the Defendant who should be found entitled to it. They cited *Dungey v. Angove* (a); *Hyde v. Warren* (b); and the following passages from Mitf. Plead. (c): "As the sole ground on which the jurisdiction of the Court in this Case is supported, is the danger of injury to the Plaintiff from the doubtful Titles of the Defendants, the Court will not permit the proceeding to be used collusively to give an advantage to either Party, nor will it permit the Plaintiff to delay the payment of Money due from him, by suggesting a doubt to whom it is due: therefore, to a Bill of Interplead-

(a) 3 Bro. C. C. 36.

(b) 19 Ves. 322.

(c) 4th Edit. 49. 143.

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er the Plaintiff must annex an Affidavit that there is no collusion between him and any of the Parties; and, if any Money is due from him, he must bring it into Court, or at least offer so to do by his Bill.”—“A Bill of this nature generally prays an Injunction to restrain the proceedings of the Claimants in some other Court; and, as this may be *used [*176] to delay the payment of Money by the Plaintiff, if any is due from him, he ought, by his Bill, to offer to pay the Money due into Court. If he does not do so, it is, perhaps, in strictness a ground of Demurrer.”

Mr. Jacob, in support of the Bill.

The VICE CHANCELLOR:

The Plaintiff is not about to take any step in the Cause, but the question is whether the Bill is maintainable. I am not aware that it is incumbent on the Plaintiff in a Bill of Interpleader, to offer, by his Bill, to pay the Money into Court: but, before he takes any step in the Cause, it is necessary that he should bring in the Money.

Demurrer over-ruled.

WOOD v. SKELTON.

1833: 8th, 10th, & 12th June.—*Heir.—Descent.*

Testator devised his Real Estates to Trustees in Trust to pay an Annuity, and, out of the Residue of the Rents, to maintain *S. W.* (who was his Heir) until he attained 21, and, on his attaining 21, to convey the Estates to him in Fee; but, if he died under 21, then to *J. S.* in Fee. *S. W.* attained 21. Held that he took the Estates by Descent.

THE Bill stated that *Richard Skelton*, being seised in Fee of Freehold Estates, and also of Customary Estates which he had conveyed and surrendered to *Joseph Skelton*, in Fee, for such uses and purposes as he might declare by his Will, dated the 8th of August 1809, devised to Trustees and their Heirs, his Freehold, Copyhold, and Customary Estates, and all his Personal Estate *and Effects, upon Trust, [*177] from time to time, to let his Freehold and Customary Estates for such term of years, at such Rents, and upon such terms, as they should think fit, during the Minority of his Grandson, *Skelton Wood*, Son of his late Daughter, *Ann Wood*, deceased, by her late Husband, *Jonathan Wood*, and to receive the Rents of his said Real Estates during the time aforesaid, and, after payment of his Debts and Funeral and Testamentary Expenses, to place out at Interest all the Residue of his Personal Estate, on Government or other Securities, in their names, and, out of the Rents of his Real Estates and the Interest of his Personal Estate, to pay to *Elizabeth Greene*,

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since deceased, for her life, an Annuity of 2*l.*, and, after payment thereof, then upon Trust, from time to time, to apply so much of the Residue of such Rents and Interest as they should think fit, for the Maintenance and Education of *Skelton Wood* until he should attain 21, and to invest the surplus at Interest; and, upon his attaining 21, to pay and transfer to him the Residue of the Rents and Personal Estate, with the accumulations thereof, after providing for the Annuity, and likewise thereupon to convey and surrender to him and his Heirs the Freehold and Customary Estates. But in case *Skelton Wood* should die before attaining 21, and without leaving any Child living at his decease, or born in due time afterwards, then the Testator directed that his Trustees should convey and surrender the Freehold and Customary Estates to his Nephew, *Joseph Skelton*, his Heirs and Assigns.

The Bill further stated that the Testator died on the 2d of January 1818, leaving *Skelton Wood* his Grandson and Heir-at-law: that, upon the death of the Testator, the Trustees entered into the possession [*178] and receipt of the Rents of the Freehold and Customary Estates, and so continued up to the time that *Skelton Wood* attained 21: that *Skelton Wood* attained 21 in or about the year 1820, when the Trustees put him into the possession and receipt of the Rents of the Freehold and Customary Estates: that, under the surrender and the Will, *Skelton Wood* became entitled to have the Freehold and Customary Estates conveyed and surrendered to him by the Trustees: that *Skelton Wood* died on the 28th of May 1832, Intestate and without Issue, leaving the Plaintiff, his Uncle and Heir-at-law (that is to say) the only Brother of *Jonathan Wood*, the Father of the Intestate, and, thereupon, the Plaintiff, as such Heir-at-law, became entitled to have the Freehold and Customary Estates conveyed and surrendered to him by the Trustees, and the Plaintiff applied to them to put him into the possession and receipt of the Rents thereof, and to convey and surrender the same to him; but *Joseph Skelton*, immediately upon the death of the said *Skelton Wood*, entered into the possession or receipt of the Rents of the Estates, and had assumed to himself the absolute and beneficial Ownership thereof, and intended to cut down Timber and exercise other acts of Ownership thereon.

The Bill prayed that the Will might be established, and that the Trustees might be ordered to let the Plaintiff into the possession and receipt of the Rents of the Estates, and to convey and surrender the same to him; that an Account might be taken of the Rents received by *Joseph Skelton* since the death of *Skelton Wood*, and that he might be restrained from receiving any more of the Rents, and from cutting down Timber on the Estates; and for a Receiver.

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*The Defendant put in a Plea to the following effect: That the [*179] Testator was the Maternal Grandfather of *Skelton Wood*, and that *Skelton Wood* was, at the Testator's death, the Heir of the Testator, according to the customs of the Manors in the Bill mentioned*, and that it was by and through the Mother of *Skelton Wood* that he became related in blood to the Testator, and that the Father of *Skelton Wood* was not related in blood to the Testator; and that the Defendant was the eldest Son and Heir-at-law, and also Customary Heir of *Joseph Skelton*, deceased, who was the eldest Brother of the Testator, and that the Defendant, upon the death of *Skelton Wood*, became and then was the Heir-at-law and Customary Heir of the Testator, and also Heir-at-law and Customary Heir of the Mother of *Skelton Wood*, and also the Heir-at-law, *ex parte Marterna*, and Customary Heir *ex parte Materna*, of *Skelton Wood*.

Mr. Knight and Mr. Rudall in support of the Plea :

Skelton Wood took both the Freehold and Customary Estates by descent; for he took an Estate which was the same, both in quantity and quality, as he would have taken by descent.

The Testator had the Equitable Interest only in the Customary Estates; and, as there are no degrees of Equitable Estates, *Skelton Wood* took precisely the same interest in the Customary Estates as the Testator himself had.

*With respect to the Freeholds, the Devise to the Trustees did [*180] not break the descent: the Legal Estate was vested in the Trustees for the purpose, merely, of giving effect to the Trusts prior to the Devise for the benefit of *Skelton Wood*. *Emerson v. Inchbird* (a); *Clarke v. Smith* (b); *Chaplin v. Leroux* (c); *Hutcheson v. Hammond* (d); *Selby v. Alston* (e); *Preston v. Holmes* (f); *Harris v. Bishop of Lincoln* (g); *Hurst v. The Earl of Winchelsea* (h).

The only question is, whether the Executory Devise over in the event of *Skelton Wood* dying under 21 without leaving a Child living at his decease, prevented him from taking by descent. The Cases of *Chaplin v. Leroux*, and *Doe v. Timins* (i); (which overrule *Scott v. Scott*) (k); are decisive authorities that such was not the case.

(a) Lord Raym. 728.

(b) Comyns, 72; S. C. 1 Lutw. 244.

(c) 5 M. & S. 14.

(d) 3 Bro. C. C. 125.

(e) 3 Ves. 339; S. C. 2 Dough. 771.

(f) Styles, 148.

(g) 2 P. W. 135.

(h) 1 Blackst. 187; S. C. 2 Barr. 879.

(i) 1 Barn. & Ald. 530.

(k) Amb. 383, S. C. 1 Eden, 458. See Sergeant Hill's Note on this Case, in Mr. Blunt's edition of Ambler, and in 1 Barn. & Ald. 542. See also *Manbridge v. Plummer*, 2 Myl. & Keen, 93.

* The Plea omitted to aver that *Skelton Wood* was the Heir-at-law of the Testator, probably because the Bill stated him to be so.

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Sir *E. Sugden* and Mr. *Tamlyn* in support of the Bill :

The Cases that have been cited as to the effect of Charges preceding the Gift to the Heir, do not bear upon the present question ; for, what-
 [*181] ever Interest may *be taken out of the Fee Simple and given to other Persons, if the remainder is not disposed of, or is given to the Heirs, he will take it as Heir. The question is not what is the effect of that which precedes the vesting in the Heir, but what is the effect of the Gift over.

In *Hutchinson v. Hammond*, it is true that the Legal Estate was devised to the Trustees, but the Legacy of 1,000*l.* became absolutely lapsed by the death of the Legatee in the lifetime of the Testatrix, and there was no Gift over ; and, therefore, it was considered as a portion of the Real Estate wholly undisposed of. That Case however, has always been considered of very doubtful authority.

Harris v. The Bishop of Lincoln, does not apply. There was an actual Gift of the Residue of the Rents of the Lands, to the Testator's right Heirs on his Mother's side ; and the question was whether the Testator intended the Heir of his Mother's Father, or the Heir of his Mother's Mother to be preferred. The question was a question of Construction, and not of Descent.

Hurst v. The Earl of Winchelsea has no bearing on the present question, It was considered to be wrongly decided, and was taken to the House of Lords, and the Appeal was ultimately compromised (1). In that Case, a person who was seised in Fee, executed a Settlement, by which
 [*182] she reserved to herself a general *Power of Appointment by Deed or Will, and, in default of Appointment, she limited the Estate to herself in Fee. She, afterwards, by her Will, exercised the Power in favour of her Son, who was her Heir-at-law, in such a way that, if she had devised the Estate to him, he would have taken by descent, and it was held that he took the Estate by descent. That decision had reference to the prior seisin of the Appointor ; but, even on that ground, it is hardly possible to maintain it.

The Case of *Selby v. Alston* decided, merely, that there was no Equity between Heirs.

We now come to *Scott v. Scott*. Putting out of sight, for the present, the devise to the Trustees which is found here, that Case is the same as this ; and it is an express authority in our favour. It must, however, be admitted, that *Doe v. Timins* is an authority against *Scott v. Scott*, and that they cannot both stand together. But we contend that the latter decision is right. Lord Keeper *Henley*, in his Judgment in *Scott v. Scott*, says that the eldest

(1) 2 Burr. 882. See the Observations on this Case in Sugd. Pow. 4th Edit. 331, and in 1 Powell on Devises, Jarman's Edit. 425, note.

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Son took by devise, as having, under the Will, a different Estate from what would have descended to him, the one being pure and absolute, the other not. If an Estate be devised to the Eldest Son of a Testator and his Heirs, with an Executory Devise over if he dies under 21, can it be said that he takes the same Estate in quantity and quality as he would have taken if the Estate had descended upon him? Those who maintain that proposition, must be prepared to say that the Executory Devise over has no effect. In *Chaplin v. Leroux*, Mr. Justice Bayley is reported to have said that a Fee mounted on a Fee, "does not turn the first into a Base [*183] Fee. This we apprehend is a mistake: for, until the event on which the Estate is given over, becomes incapable of taking effect, the first taker can have nothing more than a limited or qualified Fee. The Learned Judge seems to have formed an opinion, which is not founded in Law, that a Devise to a Man in Fee, with an Executory Devise over, creates a pure Fee Simple from the beginning, where the Executory Devise does not take Effect. That is a proposition which is wholly untenable: the Devisee takes a limited Fee when the Estate first vests in him; and, as that is the time at which the quantity and quality of the Estate must be looked at in order to determine whether it is taken by descent or by devise, it is impossible to hold that an Estate which is liable to be defeated on the happening of a certain event, can be taken by descent. It appears that Mr. Sergeant Hill thought that the decision in *Scott v. Scott* was right, though he thought that the reasons given for it were wrong. Mr. Watkins also, in his Essay on Descents (m), seems to consider that Case to have been rightly decided. In *Doe v. Timins*, Mr. Justice Bayley disposes of *Scott v. Scott*, by merely observing that it had received a sufficient answer argument at the Bar. But the only answer that it had received at the Bar, was that it had not met with the general approbation of the Profession. That, however, we deny; for many eminent Lawyers think that it was rightly decided; and we submit that the reasoning on which *Doe v. Timins* was decided, is not such as to show, satisfactorily, that *Scott v. Scott* was properly over-ruled.

*This Case, however, is distinguishable, as far at least as the [*184] Freeholds are concerned, from *Doe v. Timins* and all the other Cases, for here there was no Trust executed, but merely a Trust Executory. *Bastard v. Proby* (n). Skelton Wood could not have called for a Conveyance of the Legal Estate until he attained 21, when the Devise over would be defeated, and, therefore, until he attained that age, it could not be predicated of him that he had any Equitable Fee: he had no right whatever, in Equity, except to have a portion of the Rents applied for his maintenance,

(m) See p. 179.

(n) 2 Cox, 6.

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and, on his attaining 21, to have the Legal Fee conveyed so him. The descent, therefore, was clearly broken as to the Freeholds.

Mr. *Knight* in reply :

It is admitted that, if *Doe v. Timins* be rightly decided, it is an authority in our favour. That Case was decided after an elaborate argument, in which *Scott v. Scott* was thoroughly sifted. *Chaplin v. Leroux*, which was an earlier Case, decided the same point ; and those two Cases cannot now be over-ruled, without unsettling the established Law of Real Property. We do not mean to impugn the decision in *Scott v. Scott*. That decision was right, on the ground that an intention of Bounty to the Heir was expressed in the Will, but not for the reasons attributed to Lord *Henley*.

If a Testator says : “ If *A. B.* return from *Rome* in 20 years, I give my Estate to him,” it has been long settled that the Heir takes my descent, in the mean time. If *A. B.* does not return, does the Heir take [*185] “less by descent ? Can it make any difference, if the Testator says : “ I give my Estate to my Heir, if *A. B.* do not return from *Rome* in 20 years ?” Again, can the circumstance that it is an Equitable Estate, make any difference ; or is there any difference between a Devise to a Trustee in Trust to convey to the Heir, and a Devise unto and to the use of the Trustee in Trust for the Heir ? *Selby v. Alston* was argued on the assumption that the Estate had descended.

The VICE-CHANCELLOR :

I have very carefully considered the Plea in this Case, which consists of several affirmative propositions, and one negative one ; and I am of opinion that, if proved, it will be a complete answer to the Plaintiff’s case, that is, on the supposition that the view of the Law which the Defendant takes, is correct. With respect to that point, after the decisions in *Chaplin v. Leroux* and *Doe v. Timins*, I do not think that I ought to send a Case for the opinion of a Court of Law upon the legal question.

What Mr. Sergeant *Hill* says, in his note, with reference to the Case of *Scott v. Scott*, seems to me to be correct, namely, that the decision is right, but that the reason assigned for that decision is wrong and unnecessary.

The course, therefore, which I shall take, is to allow the Plea, leaving the Parties to appeal (if they think proper) to the House of Lords, where they can have the whole question at Law reviewed with the assistance of the Judges, and the question of Equity, if there be any after the question [*186] of Law is decided, determined by “the highest Equitable tribunal.

Supposing, however, that the Law shall be unshaken, I do not see any substantial difference between the Case at Equity and the Case at Law.

Plea allowed.

1833.—*Milligan v. Mitchell.*

MILLIGAN v. MITCHELL.

1833: 6th June and 18th July.—*Practice.—Production of Documents.*

Motion by a Defendant for the Production of a Document, admitted by the Plaintiff to be in his custody, refused.

ABOUT the year 1798, a Chapel was built by subscription, at *Woolwich*, for the use, as the Bill alleged, of the *Scotch* Presbyterian Congregation there established, and for maintaining among them the Doctrine, Discipline and Worship of the Established Church of *Scotland*, and to be always under the Ministry of a Person licenced and ordained according to the regulations of that Church: and, by an Indenture of the 14th of July 1800, a Lease of the Chapel and of the Ground on which it had been erected, was granted for 61 years, to certain Persons of whom the Defendant *Martin* was the survivor, in Trust to be assigned and disposed of as the Elders and Trustees of the Chapel, for the time being, should direct, and, in the meantime, in Trust to permit the same to be used as a place of Religious Worship, and for such other purposes as, by the practice of the Church of *Scotland*, the same ought to be used.

The Bill was filed by two of the Trustees of a Donation for the benefit of the Presbyterian Chapel of *Woodwich*, one of [187] whom was also an Elder of the Chapel, against the other Trustees and Elders, and also against *Martin*, setting forth (amongst other things), several entries in a Minute-book, kept by or under the superintendence of the Minister and Elders of the Chapel, of the Resolutions agreed to at Meetings of the Congregation, relative to the regulation and government of the Chapel and the general affairs thereof; one of which Resolutions was as follows: "That no Minister be appointed Pastor of this Congregation, who hath not been licensed to preach the Gospel according to the Regulations observed in the Established Church of *Scotland*." The Bill further stated that the office of Minister of the Chapel having become vacant, the Defendants, in breach of the trust reposed in them and in violation of the purpose for which the Chapel was established and to which it had been devoted, and contrary to the Rules and Regulations of the Established Church of *Scotland*, had engaged and employed Ministers who were Seceders from that Church, or who belonged to the different denominations of Dissenters in *England*, to preach in the Chapel, and that the Defendants intended to procure the Election of one of those Persons to be the Minister of the Chapel, and altogether to change the purpose for which it was devoted: that the Defendants were acting in pursuance of a design to frustrate the Trusts

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which had devolved upon them, and they claimed a right so to do as constituting a majority of the Trustees and Elders of the Chapel, and to administer the affairs thereof to the exclusion of the Plaintiffs and for the purpose of preventing the same from continuing to be subject to the Rules [*188] or Regulations of the Church of *Scotland*. The *Bill prayed (amongst other things) that it might be declared that the Lease of the Chapel was vested in the Defendant, *Martin*, in Trust as a place of Religious Worship according to the Institutions and Observances of the Church of *Scotland*, and subject to the Laws and Regulations thereinbefore mentioned as having been agreed to, by the Congregation, for the government of the Chapel, and that no Person was eligible to the pastoral charge of the Chapel who was not a Licentiate or Probationer of the Established Church of *Scotland*, and that the Defendants might be decreed to perform such Trusts, and to proceed to the Election of a Person duly qualified to be a Minister of the Chapel according to the Rules and Regulations aforesaid and the usage of the Established Church of *Scotland*, and that they might be restrained from employing or permitting any Person not being a Probationer, Licentiate, or ordained Minister of the Church of *Scotland*, from officiating in the Chapel, and from preventing any Person, being such Probationer, Licentiate or ordained Minister, from preaching and conducting Public Worship therein.

The Plaintiffs, in support of a Motion for the Injunction prayed by the Bill,* had made an Affidavit in which the Plaintiff *Sharp* deposed that, in 1825, he was appointed Clerk to the Minister and Elders in Kirk Session of the Chapel, and that he continued to act in such office until Feb. 1831, when in consequence of the proceedings mentioned in the Bill, [*189] he declared his intention to resign his office: that, as *such clerk, he had, and, until the due appointment of a Minister to the Chapel should take place and a new Kirk Session be thereby constituted to whom the Books might be delivered up, he still retained the custody or possession of the Minute-books belonging to the Kirk Session, and, among others, he had in his custody the Book in the Bill mentioned to have been kept by or under the direction or superintendence of the Minister and Elders of the Chapel.

The Defendants now moved that the Plaintiff, *Sharp*, might be ordered to produce on oath and leave with his Clerk in Court, the Books so admitted to be in his possession, and that the Defendants might be at liberty to inspect the same, and take extracts therefrom or copies thereof.

Mr. *Agar* and Mr. *Kindersley*, in support of the Motion :

It appears, by *Sharp's* affidavit, that the Books in question came into his

* See a report of that Motion in 1 *Myl. & Keen*, 446.

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possession as Clerk to the Kirk Session of the Chapel, and that, though he has resigned that office, he still retains them. They are admitted to be common property. The Plaintiffs state that the grounds on which they rest their Case, appear in the Minute-book, and they give, in their Bill, extracts from it. If we are allowed to look at that Book, we may be able to extract passages from it in support of our defence. If we are to file a Cross Bill for a Discovery, we should not be able to get in the answer to it, until we had put in our answer. We have the interests of others to protect; and the production of those Books is necessary to enable us to make our defence.

*[The *Vice-Chancellor* :—You do not state so in your Affidavit. [*190]

No: but the description given of the Minute-book by the Plaintiffs in their Bill and Affidavit, shows that it is necessary for us to see it in order to make our defence. It will show what the end and intention of this Institution was. We may find entries which show that the Plaintiffs' representation of the contents of the Book is garbled. In a Court of Law, it is usual for a Judge on being applied to, to order a Party to produce a Document which is necessary to enable his adversary to make out his Case.

All the individuals who constitute the body which represents the Congregation at large, are Parties to this Record, two of them are Plaintiffs, and six others Defendants. The Congregation acts by the Elders; and we are the majority of them. *Hampden v. Hampden* (a); *Princess of Wales v. Lord Liverpool* (b); *Jones v. Lewis* (c); *the Attorney-general v. Brookesbank* (d); and *Pract. Reg. Ed. Wyatt*, p. 161, "Where a Deed in the Plaintiff's hands, mentioned in the Plaintiff's Bill, was necessary to the Defendant's making his defence a full answer; the Court ordered the Plaintiff should give him a Copy of it."

Mr. *Blenman* for the Plaintiffs, said that the Order made by Sir *John Leach*, V. C. in *Jones v. Lewis*, was discharged by Lord *Eldon* (e); that there was no instance of an application similar to the [*191] present being granted, except in the case of *The Princess of Wales v. Lord Liverpool* (f); which could not be considered as establishing any general principle.

The VICE-CHANCELLOR:

It is contrary to the general tenor of the Practice of this Court, to order a Plaintiff, on the application of a Defendant, to produce a Document in his

(a) 3 Bro. P. C. 551.

(b) 1 Swanst. 114, 580, & 3 Swanst. 567.

(c) 2 Sim. & Sta. 242.

(d) 1 Youn. & Jer. 439.

(e) See Ante Vol. IV. 324.

(f) See *Pickering v. Rigby*, 18 Ves. 484; and *Spragg v. Connor*, 2 Cox, 109

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custody ; and I do not think that I am bound to follow the decision in *The Princess of Wales v. Lord Liverpool*, except in a Case precisely similar to it. There were specialties in that Case, which does not occur in this ; and I think that this Motion ought to be refused with Costs.

[*192]

*HESLOP v. THE BANK OF ENGLAND.

1833 : 10th June.—*Bank of England.—Production of Books, &c.*

To a Bill for a Discovery of Stock standing in the name of the Plaintiff's late Father, either alone or jointly, for 20 years before and at his death, and for an Inspection of the Bank Books containing the Entries of such Stock, the Bank in their Answer set forth an Account of the Stock, but declined to set forth a List of the Books containing the Entries. Held that they were not exempted from the production of their Books, and, therefore, ought to set forth a List of them.

IN November 1829, the Plaintiff filed an original Bill against *T. Metcalfe, H. S. Partridge and Mary Frances* his Wife, stating that *Luke Heslop* (who died in June 1825), bequeathed the Residue of his Estate and Effects to his Wife, *Dorothy Heslop*, for life, and, after her death, to the Plaintiff, his Son, and to the Defendant, *Mary Frances Partridge*, his Daughter, in such Shares as his Wife should appoint, and that he appointed her his Executrix : that she possessed his Personal Estate, which was more than sufficient to pay his Debts, and died in December 1827, without having exercised the Power, but having appointed the Defendant *Metcalfe*, her Executor ; and that, on the death of *Dorothy Heslop*, the Plaintiff and his Sister became entitled to the Testator's Residuary Estate in equal Moieties. And the Bill prayed that the Plaintiff might be paid his Share thereof.

In February 1832 the Plaintiff filed a Supplemental Bill against the Bank and the Defendants to the original Bill, alleging that *Metcalfe*, in his Answer to the original Bill, said he had heard *Dorothy Heslop* say, and he believed that the Testator's Personal Estate was not sufficient to pay his Debts, and that she did not possess herself of any Stock in the Funds belonging to the Testator, for that the Testator had not, at his death, any Stock belonging to him : that the Testator was a man of considerable Property,

[*193] and the Plaintiff was convinced he died possessed of *Personal Estate much more than sufficient to pay his Debts : that the Plaintiff had been lately informed that the Testator, within 20 years before, and at his death, was possessed of divers Sums of Stock standing in his name alone, or in the names of himself and some other Person or Persons in Trust for him : that the Testator was fraudulently induced by his Wife, from

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time to time, to sell out some of such Stock, and she possessed herself of the proceeds thereof, and, after his death, she sold out other parts of the Stock and applied the proceeds to her own use: that the Plaintiff had applied to the Bank to be informed, or be at liberty to search their Books in order to ascertain what Sums of Stock were standing in the Testator's name alone, or in the name of any other Person or Persons as a Trustee or Trustees for him, within 20 years previous to and at his death, and the times when, and the names of the Persons to whom the same were transferred; but the Bank, combining with the other Defendants, had refused to give any such information: that, if the Plaintiff did not obtain from the Bank the discovery sought by the Bill, and was not permitted to search their Books, he should be unable to make out what Property the Testator was possessed of at his death, and should be deprived or defrauded of his share thereof: that the Bank ought to set forth a List of their Books in which were contained any entries of the Sums of Stock so as aforesaid standing in the name of the Testator alone, or in the names of the Testator and any other Person or Persons. The Supplemental Bill prayed that the Plaintiff might be at liberty to search the Bank Books from the period of 20 years previous to the Testator's death to the present time, and that the Governor and Company might be restrained from transferring or permitting [*194] to be transferred, to *Metcalf*, the Stock standing in the name of the Testator alone or in the names of the Testator and any other Person or Persons.

The Bank, in their Answer, said that they had (as required by the Bill) set forth, in a Schedule, an account of all Sums of Stock which they believed were standing in the name of the Testator alone, or in the joint names of the Testator and any other Person or Persons within the period of 20 years previous to and up to his death, and by and to whom, and at what times the same were transferred, and what Sums of Stock were then standing in the name of the Testator and in the name or names of such other Person or Persons: that no entry of Transfer in their Books, ever stated whether such Transfer was made in Trust or otherwise; that they had caused their Accountant to inspect their Books, and had been informed, by him, and they believed that no other Sum of Stock was standing in the name of the Testator alone, or in the names of the Testator and any other Person or Persons, within the period before mentioned; that the Plaintiff had not applied to them for permission to search their Books; but, if he had made any such application, they should have refused to comply therewith, because their Books were Public Records, and related to the National Debt, and contained entries relating to the transactions and private affairs of numerous Persons: that, from the numbers of persons of the same name and frequently of the

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same or very similar descriptions having Stock in the Public Funds, they should lay a foundation for great and extensive Frauds, and, [195] many times, should occasion *great inconvenience from mere errors and mistakes, if they allowed Executors or other Persons to make any general search in their Books, and, therefore, though they furnished information of the Stock standing in the name of any individual when inquiry was made by a Person lawfully entitled thereto, yet they never permitted Persons to search such Books; and they apprehended, with reference to the duty which they owed to the Public and to the other Proprietors of Stock, that they should not be justified in so doing: that, having made the disclosure and discovery aforesaid, the Plaintiff would be able to make out the Property that the Testator was possessed of at his death, and would not be deprived or defrauded of his Share thereof by reason of his not being permitted to inspect their Books, which, for the reasons aforesaid, they submitted he ought not to be allowed to do; and, for the reasons aforesaid, they insisted that they were not compellable to set forth a List of their Books containing the entries in the Bill mentioned.

The Plaintiff having excepted to the Answer because it did not contain a List of the Books, and the *Master* having over-ruled the exception, the Plaintiff excepted to the Report.

Mr. *Knight* and Mr. *Bichner*, in support of the Exception, said that the Bank of England were not entitled to any greater privilege or exemption than any other public Trading Company: that their Answer was not put in on oath, and the Account set forth in it was merely from the statement of their Clerks: that the Plaintiff was entitled to inspect the Books [*196] containing *the entries mentioned in the Bill, and, consequently, that the Defendants ought to have set forth a List of them, in order that the Plaintiff might move for their production.

The *Attorney-general* and Mr. *Phillimore*, in support of the Report, contended that the Bank ought not to produce their Books, for the reasons stated in the Answer, and, consequently, that they could not be required to set forth a List of them.

The *Vice-Chancellor* said that it was not pretended that there was any Act of Parliament which exempted the Bank from producing their Books, and therefore he saw no reason why they should decline to set forth a List of them.

Exception allowed.

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[*197]

1833: 10th and 21st June, and 5th November.—*Will.—Construction.—Legacies.*

Testator directed Trustees to sell his Real and Personal Estate, and to apply the Produce in paying his Debts, and the Legacies *thereinafter* given. The Testator afterwards gave Legacies by Codicils, one of which was duly attested. Held that only the Legacies in the Will were payable out of the Real Estate.

Cumulative Legacies.—Testator, by a Will duly attested, gave Legacies to various Persons, charged upon his Real and Personal Estates, and payable at the end of two years after his death, and he directed, that, if his Property should be more than sufficient to pay the Legacies, they should be increased proportionably. By an *unattested* paper, purporting to be Instructions for a Will, but admitted to Probate, the Testator gave Legacies to many of the Legatees in the Will, either individually or as members of a Family; but the directions as to the time of payment and the increase of the Legacies were omitted. Held that the Legacies in the *unattested* Paper were not substitutional for the Legacies in the Will, but Cumulative.

RICHARD TRAVERS, of *Uploders*, by his Will dated the 8th of January 1804, duly executed and attested, devised certain Real Estates to *Elizabeth Ellen Ekins*, her Heirs and Assigns, and gave all his other Freehold, Leasehold and Copyhold Estates, and all his Personal Estate and Effects, to *John Strong*, and *Richard Roberts*, their Heirs, Executors, administrators and Assigns, upon Trust to sell all his Estates and Effects, and convert the same into Money; then, upon Trust to discharge his just Debts and Funeral Expenses, together with any other Expenses; then, upon Trust to apply all the remainder towards the payment of the Legacies *thereinafter* by him given: first, to his Trustees, 500*l.* a-piece, by way of compensation for their trouble in the execution of their Trust; to *Elizabeth Ellen Ekins* the sum of 500*l.*; to *Susannah*, the Wife of *John Honeybourn*, [*198] *Frances*, the Wife of *John Hansford*, and *Peggy*, the Wife of *Joseph Best*, the Interest of 200*l.* each, for their lives, and after their respective deaths, the Principal to be divided amongst their Children then living; to *Sarah*, the Wife of *William Hyde*, and Mary the Wife of *John Gill*, *Mary*, the Wife of *Thomas Garland*, and *Audrey*, the Wife of *Robert Hallett*, 200*l.* each; to *John Lawrence*, 200*l.*; to *Henry Gibbs*, 100*l.*, and, to his Sisters, the like Sum of 100*l.*, to be equally divided between them. And the Testator gave 200*l.* equally between the Children of *Jane* who married at *Richmond*, and whose maiden name was *Lawrence*; 100*l.* to *Anne Lawrence*; 100*l.* to *Joan*, the Wife of *Thomas Cook*; 100*l.* each to *Richard Gill* and *Robert Gill*, Sons of the late *Matthew Gill*; 500*l.* to *Robert Roberts*, of *Gorwell*; 50*l.* each to the Children of the late *William Roberts*, of *Bristol*; to the Wife of *Henry Richards*, the Interest of 200*l.*

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for her life, and, after her death, the 200*l.* to be divided equally between her Children; to *Grace Roberts*, 500*l.*; to *Mrs. Fanny Roberts*, 550*l.*; 50*l.* each to *Richard Sabine*, *Thomas Sabine*, *Sydenham Sabine*, and *Agnes Taunton*, the Wife of *Thomas Taunton*; to such of the Sons of *John Burt* as should be living at the Testator's decease, 50*l.* each, and a further Sum of 200*l.* to *Thomas G. Burt*, Son of *John Burt*; to *Ann Way*, daughter of *George Burt*, 100*l.*; to *Josh. Bowring*, *George Bowring*, *Elizabeth Weaver*, and *Mary Genge*, 50*l.* each; to *Jane Axe*, 100*l.*; to *John Axe*, jun., 20*l.*; to *John Strickland*, 20*l.*; to Captain *Ingram*, one half of the Testator's Wines and Spirituous Liquors; to *John Sutherland*, [*199] *Thomas Southcomb*, and *Thomas Knight*, 100*l.* each; to the Rev. *Robert Hunter*, *George Knight*, and *Edward Dally*, 10*l.* each; to his (the Testator's) Servant, *Elizabeth Bagg*, 100*l.*, and the further Sum of 10*l.* for Mourning; to his Servant, *John Budden*, 50*l.* and the further Sum of 5*l.* for Mourning; to his Servant, *John Gill*, a complete Suit of Clothes; to *Henry Gale* 20*l.*; to *George Hart*, 50*l.*; to the Vicar of *Loders*, 10*l.*, if not resident, to the Curate at the time, for a Sermon on the Sunday after the Testator's burial; to the Clerk of *Loders*, two Guineas. The Testator then directed where he was to be buired; and afterwards gave to the Rev. *Samuel Strong*, 200*l.*; to *Robert Strong*, *Elizabeth*, *Mary*, and *Grace Strong*, equally to be divided amongst them, the Money that the Testator had sold *Halstock* and *Bonvill* Estates for, as they were the next Heirs to it; to *Thomas Marsh*, 10*l.*; to his Servant *John Bagg*, a complete Suit of Clothes; to *Elizabeth Rideout*, 50*l.*; to the Children of the late *Sarah Sawkins*, equally to be divided amongst them, 200*l.*; to *Henry Hine*, 20*l.*; to *John Axe*, jun., in Trust, 100*l.*, to lay out 10*l.* annually, in Fire or Bread for the Poor of *Loders*, whichever should be judged, by the Vicar and himself, to be the most wanted, the Money to remain in *John Axe*'s hands, which he was to have the use of for his trouble; to the Vicar and Churchwardens of *Netherbury*, 10*l.*, to be given in Bread to the Poor. The Testator then gave the other half of his Wines and Spirituous Liquors to *Mrs. Roberts*, and *Mrs. Ekins*, equally between them, with a Hogshead of Strong Beer each; and to *Elizabeth*, the Wife of *William Davis*, 200*l.* "If I should have omitted any one of [*200] my First of Kin, either on my *Father or Mother's side, and not have left any Legacy to them or their Children, my will is that they shall have 200*l.*, the same as the others of the same kindred have had given them by my Will. I do direct that my Trustees shall not be obliged to pay the Legacies till two years after my death, without the Property is sooner disposed of. If the Legacies given should be found to exceed my Property, my will is that a proportionate abatement shall take place on each Legacy

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that I have given ; on the contrary, if it should exceed it, to have the like proportion added to each Legacy. And I appoint the said *John Strong* and *Richard Roberts* joint Executors in Trust of this my last Will and Testament."

The Testator, by an unattested Codicil, dated January 1805, bequeathed 5*l.* a year to *John Gill*, sen. for his life, to be paid by his Trustees *John Strong* and *Richard Roberts* : and, after giving directions respecting the settling of an account between himself and Mr. *Richard Roberts*, he bequeathed to his Servants, *Elizabeth Bagg* and *Lyria Hansford*, certain articles of Plate and Household Furniture, with a Legacy of 20*l.* to the latter ; to Mrs. *Fanny Roberts*, his Tea and Dessert Spoons, and a quarter part of his Wines and Spirituous Liquors ; and, to Mrs. *Ekins* the other quarter part and a Silver Tankard ; to *Mary Sutherland*, a Gold Watch and Chain and 100*l.* ; to *Susannah Honnibourne*, the part of the Dwelling-House that she then lived in, with half the Plot and the whole of the Garden adjoining and to her Daughter *Awdrie Clark*, the other part of the Dwelling, the Garden adjoining, with half the Plot ; to *Thomas Banger*, 10*l.* ; to *John Gill*, jun. the whole of what he might owe to the Testator at his de- [*201] cease, and likewise a House and Orchard in the occupation of *John Bagg* ; to *William Hyde* what he might owe to the Testator at his decease ; and, to his Son, *Richard Hyde*, the House, Orchard and Garden occupied by *J. Symes* ; and to *J. Hansford's* eldest Son, the House and Orchard in the occupation of *Ann Mathews*.

At the foot of the Codicil, the Testator wrote as follows :—

" Wednesday Evening, 9th January 1805.

" *N. B.* This is not gone on with, but, so far, my wish is (though not signed) that all on this Paper be ratified and confirmed by whom it may concern,

" *Richard Travers.*"

The Testator made another Codicil, dated the 26th of June 1806, which was duly executed and attested ; and, after reciting that *Ellen Ekins* had died since the making of his Will, he directed that the Estates and Legacies thereby given to her, should sink into his Residuary Estate ; and he revoked the Bequest in his Will to *Elizabeth Strong*, *Mary Strong*, and *Grace Strong*, of the Monies for which his Lands at *Halstock* and *Bonvill* sold for, and gave such Monies to their Brother, *Robert Strong* ; and, to *Elizabeth*, *Mary*, and *Grace Strong*, 200*l.*, equally to be divided between them ; 100*l.* to *Samuel Way* ; and to *Henry Way*, Son of *Samuel Way* of *London*, 100*l.* ; to *William Way* and Mrs. *Harrington*, the Brother and Sister of *Samuel Way*, 50*l.* each ; to *Elizabeth Bagg*, 100*l.* more than he had given her by

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his Will; to *Thomas Sabine*, the further Sum of 100*l.*, in consid-
[*202] eration of the trouble he had *taken about the Testator's concerns.

And he gave the share of his Wines and Spirituous Liquors, which he had given by his Will to *Ellen Ekins*, to Mrs. *Fanny Roberts* in addition to what was therein given to her.

The Testator made another Codicil or Testamentary Paper, not duly at-
tested, which was as follows:—

An account of *Richard Traver's* Relations :

	£.	
John Strong	1,000	
Samuel Strong	1,000	
Mrs. Davis and Children	1,000	
John Burt's Children	1,000	
Bowring Family	1,000	
Sabine family (Mr. Taunton, under Trust)	150	each.
Way family, in London	400	
Richard Robert's Children, of Burton	200	each.
Robert Robert's Children, of Gorwell	1,000	
Mrs. Richards (under Trust), to be equally divided at her death, between her two Children	1,000	
Mrs. William Roberts and family at Bristol, to be divided - between her Children after her death	1,000	
Richard and Robert Gill	500	each.
Susan Honeybourn and Family and the House and Plot she lives in.	600	
Sarah Hyde and Family	1,000	
Fanny Handsford (in Trust), and Family	100	
Molly Gill and Family	1,000	
Captain Lawrence, Exeter	500	
Mrs. Ann Knight, of Burton	100	
[*203] *Peggy Best, late Jenny Lawrence's two Children in Lon- don, if living.	50	each.
Henry Gibbs	300	
John Hallet, of Shipton	400	
Henry Gibbs's two married Sisters	25	each.
Henry Gibb's maiden Sisters	25	each.
Henry Gibbs, sen. of Bradpole	10	
John Sutherland's two Children, William and Mary	25	each.
Mrs. Cooke, of Neddlecombe	100	

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	£
Josh. Way, jun. Son of Ann Burt	200
John Budden, late Servant	100
John Axe	100
Betty Bagg, 300 <i>l.</i> to her own sole use,	
Henry Gale, of Upton	20
Mary Sawkins	100
Poor of Uploders,	50
Poor of Lodors	50
Clerk of the Parish	5

“These are the instructions given by *Richard Travers* to *Giles Russell*, to make his Will by to-morrow morning: July the 27th, 1813.

“*Richard Travers.*”

The Testator died on the 28th of July 1813, and a Suit having been instituted for the administration of his Estate, a Report was made, by the *Master*, in the course of the Cause, finding that the Legatees to whom Legacies were given by the Will, and also by the two Codicils of 1805 and 1806, and the Testamentary Paper of 1813, were entitled to all the Legacies thereby given; and that none of the Legacies given by [*24] either of the Codicils or by the Testamentary Paper, was a *substitution for any Legacy given, by the Will or by the other Instruments, to the same Legatee; that the Codicil of 1805, and the Testamentary Paper of 1813, not having been executed so as to pass Real Estates, and the whole of the Stock in Court in the Cause having arisen, wholly, from the Testator's Real Estates, the Legatees named in those two Instruments, were not entitled to any part of such Stock.

There being no Funds for payment of the Legacies, except the Stock in Court, one of the Legatees, who was named in the Testamentary Paper alone, took exceptions to the Report, insisting that the *Master* ought to have reported that the Legacies bequeathed by the second Codicil and by the Testamentary Paper, were payable out of the Funds in Court: that the Legacy given to any Legatee by the Testamentary Paper, was in substitution of the Legacy or Legacies given to the same Legatee by the Will or by the Codicils, or either of them: that the Legacies given by the Testamentary Paper to the *Sabine* Family and to the *Bowring* Family, were respectively in substitution for the Legacies given by the Will and second Codicil to *Richard*, *Thomas*, and *Sydenham Sabine* and *Agnes Taunton*, formerly *Agnes Sabine*, and to *Joseph* and *George Bowring*, *Elizabeth Weaver*, formerly *Elizabeth Bowring*, and *Mary Genge*, formerly *Mary Bowring*. The Exceptions then proceeded to point out other instances in which Legatees in the Will took Legacies under the Testamentary Paper, either as individ-

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uals or as members of a Family, and to insist that the latter were in substitution for the former; and the last Exception contended that the Testamentary Paper was intended to operate as a revocation of the several [*205] Legacies given by the Will and Codicils, to all the Legatees therein named.

The Attorney-general, Mr. Knight, Mr. Rolfe, Mr. Norton, Mr. Bellamy and Mr. Reynolds in support of the Exceptions:

The Master cannot be right in holding that the Legacies given by the attested Codicil are Charges on the Land, and that the Legacies given by, the unattested Codicils are not Charges on the Land. The attested Codicil contains no words to charge the Land; it merely gives Legacies; and, consequently, the distinction which the Master has drawn between the attested and the unattested Codicils, cannot be supported.

The Testator has devised all his Real and Personal Estate to Trustees, in Trust to sell and convert the same into Money, and then upon Trust to discharge his Debts and Funeral Expenses, and to apply all the remainder towards the Payment of the Legacies thereafter by him given; and, at the conclusion of his Will, he directs that, if the Legacies are not sufficient to exhaust the fund, they shall be increased proportionably. He has, therefore, converted his Real Estate, out and out, into Personalty, and has given away the whole in certain definite Legacies. By the Testamentary Paper, he has done nothing but modify the Legacies which he had before charged upon the mixed Fund; and, consequently, the Legacies given by that Paper (although it is unattested), are Charges on the Land. *The Attorney-general v. Ward* (a); *Durour v. Motteux* (b); *Kennell v. Abbott* (c); *Maugham v. Mason* (d); *Green v. Jackson* (e); *Jackson v. Jackson* (f).

The Testamentary Paper appears, on the face of it, to have been intended to be a substitution for the prior Instruments. When we look at the heading and at the conclusion of it, and when we see that most of the Legatees in the Will and Codicils are entitled, either as individuals or as members of a Family, to Legacies under it is it possible to say that the Testator did not intend it, to comprise all his Testamentary Dispositions, but that he merely meant to make additions to his Bequests? The Gifts to *Susan Honeybourn* and to the Clerk and Poor of the Parish especially, show that the Testator intended the Testamentary Paper to be a substitution for the Will and Codicils. *Hemming v. Gurrey* (g); *Fraser v. Byng* (h).

(a) 3 Ves. 327. (b) 1 Vez. 320. See 1 Sim. & Stu. 292; note (d). (c) 4 Ves. 802.

(d) 1 V. & B. 410. See 417. (e) 5 Russ. 35. (f) 2 Cox. 85.

(g) 2 Sim. & Stu. 311. The Decree was affirmed by the House of Lords, 1 Bligh. New Ser. 479. (h) 1 Russ. & Mylne, 90.

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Sir *E. Sugden*, Mr. *Pepys*, Mr. *Jeremey* and Mr. *Rudall*, in support of the Report :

In this Case there is no conversion of the Real Estate out and out ; but there is, simply, a conversion for the Persons who take under the Will. If, however, there were a conversion out and out, the produce could not be disposed of by an unattested Codicil. The whole of it is exhausted by a Will duly attested. *Sheldon v. Goodrich* (i) ; *Hooper v.* [*207] *Goodwin* (k) ; *Beckett v. Harden* (l) ; *Ackroyd v. Smithson* (m).

The Case of the *Attorney-general v. Ward* does not apply ; for the Testamentary Paper creates new Legacies ; it does not merely substitute one Legatee for another.

The VICE-CHANCELLOR :

In this Case, the Testator by his Will (which has been declared to have been well proved), after disposing of a certain portion of his Freehold Estate, devised as follows : “ And, as to all my other Freehold, Leasehold and Copyhold Messuages, Lands, Tenements, Hereditaments and Premises, with the Appurtenances, and all my Personal Estate and Effects whatsoever and wheresoever, I give, devise and bequeath the same unto my Friends, *John Strong* and *Richard Roberts*, their Heirs, Executors, Administrators and Assigns, upon Trust that they my said Trustees and their Heirs, do, with all convenient speed after my decease, sell all my Estates and Effects and convert the same into Money ; then upon Trust to discharge all my just Debts and Funeral Expenses, together with all other Expenses ; then upon Trust to apply all the remainder towards the Payment of my Legacies hereinafter by me given.” And then he proceeds to give a variety of Legacies : and, at the end of the Will there are these words : “ And I direct that my Trustees shall not be obliged to pay the Legacies till two years after my death, without the Property is sooner disposed of. If the *Lega- [*208] cies given should be found to exceed my Property, my Will is that a proportionate abatement shall take place on each Legacy that I have given : on the contrary, if it should exceed it, to have the like proportion added to each Legacy.” The Testator then made a Codicil of the 9th of January 1805, which was unattested, and by that he gave some small pecuniary and several specific Legacies : he then made a Codicil of the 26th of June 1806, which was duly attested : subsequently he made what is called a Testamentary Paper, which was admitted to Probate by the Ecclesiastical Court, but which is, obviously, an incomplete instrument. At the foot of this Paper, the Testator wrote the following words : “ These are the instructions given by *Richard Travers* to *Giles Russell* to make his Will by to-

(i) 8 Ves. 481.

(l) 4 M. & S. 1.

(k) 18 Ves. 156.

(m) 1 Bro. C. C. 503.

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morning.” The Paper, however, contains nothing but what the heading of it denotes, namely, an account of the Testator’s Relations, with various Sums set opposite to their names. This Paper, having been admitted to Probate, may operate upon the Testator’s Personal Estate; and it has been contended that, inasmuch as a great number of Persons are named in it whose names are found in the Will and Codicils, the Legacies which are given by it were meant to be substitutional for the Legacies which are given by the Will and Codicils. But it is observable that, in many instances, the Legacies which are given by the Testamentary Paper, are not given to the same Persons as are named in the Will, but are given in words that may extend to other Persons than those who are entitled to take as Legatees in the Will, as, for instance, the words “Family, Children, Sisters,” are sometimes used.

[*209] “If it were allowable to indulge in conjecture, one cannot but suppose that the Testator did intend to make a new Will; but it is obvious that this Paper is in so complete a state, that it cannot be taken as a Will. It appoints no Executors, and makes no disposition of the residue.

It appears that the Personal Estate has been exceedingly deficient, and the only Fund which remains to be divided, is a fund which has arisen from the Testator’s Real Estates. Several Exceptions have been taken to the *Master’s* Report, the general purport of which is that the *Master* has done wrong in finding that the Legacies given by the Testamentary Paper, are not substitutional, but cumulative Legacies. When, however, the Testamentary Paper is contrasted with the Will and Codicils, it does, I think, appear that I am not at liberty to say that the Legacies given by that Paper, were intended to be substitutions for the Legacies given by the preceding Instruments. In Cases where there have been slight variations only between the Legacies given by a Will, and those given by a subsequent Instrument, the Court has held that the latter were meant to be substitutions for the former. But, in this Case, there is a manifest difference between the Legacies given by the Will, and the Legacies given by the Testamentary Paper. In the first place, the Clause at the end of the Will, has the effect of making every Legatee who is named in it, take a further Sum of Money, in proportion to the amount of his Legacy, out of the clear residue of the Testator’s Real and Personal Estate, provided it should be found more than sufficient to pay the Legacies. That Clause, however, is not

[*210] found in the Testamentary Paper. In the next place, “the Paper operates upon the Personal Estate only, but the Will operates upon the Freehold and Copyhold, as well as the Personal Estate. Again, in the Testamentary Paper, no time is expressed for the payment of

1833.—Harrison v. Boydell.

the Legacies, and, consequently, they all would be payable at the end of one year after the Testator's death; whereas, by the Will, the Testator has directed that the Trustees shall not be obliged to pay the Legacies till two years after his death, without the Property is sooner disposed of. The Persons who are named to take as Legatees by the Testamentary Paper, cannot take their Legacies as charged upon the Freehold Estate; for the Testator has expressly directed that the Surplus of the whole Fund arising from the Sale of his Freehold and Copyhold and Personal Estate, which shall remain after the payment of his Debts and Legacies, and Funeral Expenses and other Expenses, shall be applied towards the payment of his Legacies thereafter by him given. If there could have been any doubt upon this point, the matter has been put at rest by the decision in the Case of *Bonner v. Bonner* (n); and also by the decision in *Hannis v. Packer* (o).

My opinion therefore is, without entering into the minute questions which are raised, as to a great number of these Legacies, by exceptions adapted to them severally, that there is no pretence for saying that the Legacies given by the Testamentary Paper, are substitutions for the Legacies given by the Will and Codicils. The consequence is, that the Exceptions must be over-ruled.

HARRISON v. BOYDELL.

['211]

1833: 12th June.—Receiver.

A Receiver who had been discharged, did not pay in his Balance on the day fixed by the Master. Ordered that he should pay in the same, and also the amount allowed for his Salary, with Interest.

A RECEIVER appointed in this Cause, was discharged by an Order of the 16th of February 1832. The Master, by his Certificate dated the 16th of April 1833, found the Balance due from the Receiver on the 16th of February 1832, (after allowing him 8l. 7s. 6d. for his Salary) to be 139l. 11s. 5d.; and, in pursuance of the General Order (a), the Master appointed the 7th of May 1838 for the payment of the Balance into Court.

The Receiver not having paid in the Balance, a Motion was made that he might be ordered to pay in the same and also the amount allowed for his Salary, together with Interest, on both Sums, at Five per Cent., from the day appointed by the Master, and that he might also be ordered to pay the Costs of the Motion.

(n) 13 Ves. 879.

(o) Amb. 556.

(a) See Orders in Chancery; Ed. Beames, 461.

* Ex Relations Mr. Beames.

 1833.—Burrell v. Nicholson.

Mr. *Beames*, in support of the Motion, referred to the General Order, and to *Potts v. Leighton* (b), adding that the Court ought to follow the rule laid down for the guidance of the *Master*, who, in consequence of the Receiver having been discharged, could not act under the General Order.

Motion granted

[*212]

*EX PARTE JACKSON.

1833: 13th June.—*Infant*.—*Guardian*.

Guardian appointed to an Infant entitled to Freehold Property worth 80*l.* a year, without a reference.

ON a Petition by an Infant entitled to Freehold Property of the annual value of 80*l.* praying that his maternal Uncle might be appointed his Guardian, the *Vice-Chancellor* made the Order without a reference to the *Master* (a).

Mr. *Blunt* appeared in support of the Petition.

BURRELL v. NICHOLSON.

1833: 17th June.—*Practice*.—*New Orders*.

The Orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from.

The time allowed by the 12th Order for procuring the Report as to the insufficiency of an Answer, extended, the drawing up of the Order having been delayed by the Offices being closed, and the Plaintiff having, through inadvertence, omitted to obtain the *Master's* Certificate that further time was necessary to enable him to make his Report.

MOTION, by Plaintiff, that the time allowed by the 12th Order of 1828, for procuring the *Master's* Report as to the insufficiency of an Answer, might be extended.

the Motion was supported by an Affidavit stating that the Order of Reference was obtained on the 13th of May, that the Offices were then closed for the recess, and did not re-open until the 20th, when the Plaintiff got the Order drawn up and that the Plaintiff, through inadvertence, neglected to procure the *Master's* Certificate that further time was necessary to enable him to make a satisfactory Report.

Mr. *Kindersley* for the Plaintiff.

Mr. *Pepys* and Mr. *Parker*, for the Defendant, said that the Order declared the Answer to be sufficient, and left no discretion in the Court.

(b) 15 Ves. 273.

(a) See *Ex parte Wheeler*, 16 Ves. 266; *Ex parte Janion*, 1 J. & W. 395; *In re Jones*, 1 Russ. 478; and see *Seton* on Decrees, 280

1833.—*Ellis v. Earl Grey.*

The VICE-CHANCELLOR :

The Orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. Here the delay in drawing up the Order, was caused by the Offices being closed for the vacation, and the omission to procure the *Master's* Certificate that further time was necessary to enable him to make his Report, arose from inadvertence ; and, therefore, I think that a fortnight's further time ought to be allowed, on the Plaintiff paying the Costs of this application.

**ELLIS v. EARL GREY.*

[*214]

1833: 21st June.—*Jurisdiction.—Injunction.—Lords of the Treasury.*

Injunction granted to restrain the Lords of the Treasury from paying the Compensation awarded under 11th Geo. 4, and 1 Will. 4, c. 58, for the office of Side Clerk in the Exchequer, which had been abolished.

THE Bill which was filed against the Lords of the Treasury, *John Watson Walmsley, R. Thomas* and *Sir Robert Laurie*, stated that, under an Indenture of Co-partnership dated the 23d of January 1823, *Ralph Ellis* the elder, the Plaintiff *John Ellis*, *Ralph Ellis* the younger, the Defendant *Walmsley*, and *Thomas Gorton* carried on the business of Attornies, Solicitors and Agents : that, during the Co-partnership, *Ralph Ellis* the elder, held the office of one of the Side Clerks on the Plea side of the Court of Exchequer : that, in 1827, *Ralph Ellis* the elder and *Ralph Ellis* the younger, agreed with the Plaintiff and with *Walmsley* and *Gorton* to retire from the Partnership, and the Plaintiff and *Walmsley* and *Gorton* agreed to form a new Partnership together ; and that, by an Indenture dated the 24th of October 1827, and made between *Ralph Ellis* the elder, the Plaintiff, *Ralph Ellis* the younger, and *Walmsley*, and *Gorton*, the then existing Partnership was dissolved, and the Goodwill of the Business was resigned by *R. Ellis* the elder and *R. Ellis* the younger, to and in favour of the Plaintiff and *Walmsley* and *Gorton* as Partners and for the purposes of the Partnership thereby established ; and *Ralph Ellis* the elder covenanted with the Plaintiff and with *Walmsley* and *Gorton* their Executors and Administrators, that he would thenceforward stand possessed of the office of one of the Side Clerks of the Exchequer, in Trust for *Gorton*, and for the purposes and benefit of the Partnership by the now-stating Indenture agreed on, *while continuing, and that he would, when [*215] required by the Plaintiff and by *Walmsley* and *Gorton* or either

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of them, and at the expense of the new Partnership, procure *Gorton* to be appointed to the office in his place. And it was further agreed that, from and after the determination of the new Partnership, the office should be held in Trust for *Walmsley* and *Gorton* equally, for their joint lives, and, after the death of one of them, in Trust for the Survivor, or, while both should be living and after the Partnership should be expired or determined, either *Walmsley* or *Gorton* might require the office to be sold for their mutual and equal benefit: and the Plaintiff, and *Walmsley* and *Gorton* agreed with each other to become and continue Partners in the business of an Attorney, Solicitor and Agent, for the term of Ten Years from the 31st of August then last, in the Shares and upon the Terms mentioned in the Indenture.

The Bill further stated that the Plaintiff was a sworn Clerk in the Court of Chancery when the new Partnership was formed, and, therefore, it was agreed that *Gorton* should be appointed to hold the office of Side Clerk in the Exchequer, in Trust for the new Partnership, until such office should be abolished, which was then expected to take place very shortly and before the term of the new Partnership would expire: that, soon after the commencement of the new Partnership, *Ralph Ellis* the elder surrendered up the office in the Exchequer, and *Gorton* was appointed thereto, and, on that occasion, 315*l.* was paid, as a Fee on admission to the office, out of the new Partnership, and the Sum of Ten Guineas was also paid, [*216] in each year, out of the joint Fund, (being the Fee paid to one of the sworn Attornies of the Court of Exchequer,) until the office was abolished, and the Fees and Emoluments of the office were received for the joint use of the Partnership: that under a Proviso in the Deed of October 1827, *Gorton* was, on the 30th of January 1830, dismissed from the Partnership, and, shortly afterwards, was declared a Bankrupt, and the Defendant *Thomas* was chosen his Assignee: that the Plaintiff and the Defendant *Walmsley* continued to carry on the Partnership business, and, during the continuance thereof, and in July 1830, an Act of Parliament was passed, intituled: "An Act for Regulating the Receipt and future Appropriation of Fees and Emoluments receivable by Officers of the Superior Courts of Common Law" (a), and also an Act intituled: "An Act to Explain and Amend an Act for Regulating the Receipt and Future Appropriation of Fees and Emoluments receivable by Officers of the Superior Courts of Common Law" (b); and, by the first-mentioned Act, it was, amongst other things, enacted that, except as thereafter mentioned, every Person who, on the 24th of May 1830, should have held any

(a) 11 Geo. 4. and 1 Will. 4, c. 58, ss. 1, 5, 6, 16.

(b) 1 & 2 Will. 4, c. 35.

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office in or belonging to any of the said Courts, in Fee, or for any term either for life or years, or who should then have been appointed to any other office or employment in or belonging to any of the said Courts, by virtue of any right of appointment theretofore exercised by any of the Judges of His Majesty's Courts of Record at *Westminster*, should, forthwith after the passing of the Act, make out and render to the Commissioners appointed by the Act, an Account, "in writing, of the Fees or [*217] Emoluments of such office or employment as therein mentioned, and such Commissioners were to ascertain the gross and net Annual Value of the said Fees and Emoluments, and to certify the same, under their hands, to the Commissioners of His Majesty's Treasury for the time being: provided that, if any such office or employment as aforesaid, should be abolished by lawful authority, every Person who, under the provisions of the Act, would have been entitled to receive the difference between the net amount of the Fees and Emoluments which would have become due, and the certified value of such office or employment, in case the said office or employment were not abolished, should be entitled to receive, during all the time for which such Person was entitled to hold the office or employment so abolished, such Annual Sum as any three of the Commissioners of the Treasury for the time being, and the Lord Chief Justice or the Lord Chief Baron of the Court to which such office or employment might belong, should fix and appoint as a full and fair compensation for the loss of such office or employment.

The Bill further stated that, by virtue of the said Acts of Parliament or one of them, the office of Side Clerk of the Exchequer was abolished; and that, on the said 24th of May 1830, *Gorton* held that office for the benefit of the Plaintiff and *Walmsley*, and the Compensation which thereupon was to be awarded in lieu of the Fees and Emoluments of the office, became Partnership Assets, and liable to be divided as such on the settling of the Partnership Accounts: that, on the abolition of the office, the accounts of the Fees and Emoluments required by the Act, was made out, at the "expense of the Partnership, by the Plaintiff and *Walmsley*: [*218] that, on the 6th of December 1830, the Partnership between the Plaintiff and *Walmsley* was dissolved, but without prejudice to the rights and interests of the respective Parties in the Partnership Assets: that, when the dissolution took place, the amount of the Compensation to be made in respect of the abolition of the office of Side Clerk, had not been ascertained, and it was, therefore, agreed between the Plaintiff and *Walmsley*, that the Plaintiff's right and interest in the Compensation, should not be affected by the dissolution: that, after the dissolution, *Walmsley*, with the privity of the Plaintiff caused the account of the Fees and Emolument

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of the office to be made out at the joint expense of the Partnership, and the Lords of the Treasury settled the Compensation for the abolition of the office to be the Annual Sum of 800*l.* payable during *Gorton's* life: that an *ex parte* statement was made to the Lords of the Treasury by *Walmsley*, whereby it was made to appear that the Compensation belonged, exclusively, to him, and to *Thomas* as *Gorton's* Assignee, in consequence of which the Lords of the Treasury directed the Compensation to be paid to *Walmsley* and *Thomas*, to the exclusion of the Plaintiff: that the Plaintiff, when he discovered that it was so ordered to be paid, presented a Memorial to the Lords of the Treasury, praying that the payment might be suspended until his claim to a share thereof should be ascertained: that the Lords of the Treasury had lately paid, to *Walmsley* and *Thomas*, 2,400*l.*, being the amount of three years' payments of the 800*l.*, and that they intended to pay to them the 800*l.* as the same should become due.

[*219] The Bill prayed that the Plaintiff might be declared to be entitled to one half part of the Compensation Money, for *Gorton's* life, or to such other part thereof as the Court should direct, and that the same might be ascertained and paid to the Plaintiff accordingly; or that the Compensation Money might be declared to be Partnership Assets, and that the Plaintiff might be decreed to have a lien thereon for what might be found due to him, from *Walmsley* and from *Gorton's* Estate, on taking the Partnership Accounts; and that an account might be taken of the Arrears and growing Payments of the Compensation Money, and that the Defendants, the Lords of the Treasury, might be decreed to pay the same and the Arrears and growing Payments thereof into Court, to the credit of a Cause of *Ellis v. Walmsley* (which had been instituted by the Plaintiff for taking the Partnership Accounts) or that a Receiver might be appointed of the Compensation Money, and that the Lords of the Treasury might be restrained from paying the same to *Walmsley* and *Thomas*.

The Lords of the Treasury demurred to the Bill, for want of Equity and because they were sued thereby and made Parties thereto as Public Officers, and they were not liable to be sued, in respect thereof, in the Court of Chancery, in such manner and form as the Plaintiff had by his Bill complained against them.

The Attorney-general and Mr. Wray, in support of the Demurrer:

[*220] *The Act of Parliament authorises the Lords of the Treasury merely to fix the Compensation to be made for the offices that may be abolished. It does not point out the Fund out of which the Compensation is to be paid; nor does it direct the Lords of the Treasury to pay it. But, assuming that the Lords of the Treasury are to pay the Compen-

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sation out of the Consolidated Fund, they are not amenable to this Court, so as to be directed to make a payment out of that Fund.

In *Oldham v. The Lords of the Treasury*, a Case in the Exchequer, but which is not reported, the King, being entitled to receive a certain Sum out of the Consolidated Fund in respect of the Civil List, granted a Pension to a Party who assigned it. The Pension was, afterwards, revoked, and a new one was granted in lieu of it; and the Assignee filed a Bill against the Lords of the Treasury, to compel them to pay the new Pension to him. *Graham, Baron*, who delivered the Judgment of the Court, said: "This Bill proceeds on the ground of the fundamental jurisdiction of the Court over the Consolidated Fund; and the purpose of the Bill is to call on the Court to dispose of the Money which has been placed by Parliament at the disposal of the King himself. The jurisdiction of the Court of Exchequer extends only to the reaching the Monies which come into the Treasury, while they are *in transitu*: but, after Parliament has disposed of them and they have reached their destination, the jurisdiction of the Barons ceases; and here the King alone can order the payment of the Money. The Money is granted to the King, his Successors and Assigns; and the King himself must be sued by Petition of Right, if this Money is to be got at."

"The 800*l.* a year is the creature of the Act, and, under the [221] Act, it is given to Mr. *Gorton*, who alone appeared to the Public to be entitled to it. The Plaintiff asks, by his Bill, that he may be paid a share of the Compensation, or that it may be declared to be Partnership Assets, and that the Lords of the Treasury may be directed to pay it into Court, to the credit of the Cause of *Ellis v. Walmsley*. But what have the Lords of the Treasury to do with this? They are merely the organs by which the Revenue of the country is to be disposed of, and, as being Public Officers, this Court can have no jurisdiction over them. *Priddy v. Rose (c)*.

Mr. *Kindersley* in support of the Bill:

The office of Side Clerk in the Exchequer, did not fall within the provisions of the 5 & 6 Edw. 6, c. 16, against the buying and selling of offices; therefore the dealing with it was not illegal (*d*).

We do not ask the Court to direct any payment to be made out of the Consolidated Fund. The 800*l.* a year is an ascertained Sum which has been directed to be paid under the sanction of an Act of Parliament. There is no discretion to be exercised or responsibility to be incurred respecting the payment. The payment of a Pension granted by the Crown, depends, from year to year, on the pleasure of the Crown. The Act is a Public Act,

(c) 3 Mer. 86.

(d) See 3 Cruise's Dig. 160, *et seq.*, in which the Cases which have arisen under this Act, are collected.

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and, therefore, it was not necessary to state all its provisions in [*222] the Bill. It is to be inferred, from *those provisions, that the Lords of the Treasury are to make the payment : and, moreover, the Bill charges that they have paid, and intend to continue to pay it. It is not discretionary in the Lords of the Treasury either to make or to withhold the payment : they are not made Parties to the Bill as Public Functionaries, but as mere Stakeholders of the Fund ; and, in that character there can be no objection to their being restrained from making the payment as they have hitherto done, until the rights of the opposing Claimants have been determined.

The Commissioners of Woods and Forests are Public Officers ; and yet the Court, in a recent Case, granted an injunction against them (e).

The VICE-CHANCELLOR :

There is nothing stated in the Bill to show that the office of Side Clerk in the Exchequer is an office concerning the administration of justice, within the meaning of the Act of Edward 6, or that it is inconsistent with public policy that this Court should take notice of any dealings between individuals respecting such an office ; and the Court is not at liberty to indulge in surmises as to the nature of the office.

It does not appear from those parts of the Act which are set forth in the Bill, nor is it plainly expressed in the Act itself, in what way the Lords of the Treasury are connected with the payment of the Sum in ques- [*223] tion ; but I think it must be inferred that the Compensation *Money is to be paid out of the Consolidated Fund, and that it is to pass through the hands of the Lords of the Treasury, who are to be mere ministerial conduit-pipes for payment of it to the Parties entitled. The Lords of the Treasury, therefore, are not, at all, in a different situation from the Governor and Company of the Bank of England, who are frequently prevented, by this Court, from transferring Stock or paying Dividends to the individuals who appear, on their Books, to be entitled to them. This Court has interfered with other Public Officers, as, for instance, the Commissioners of Woods and Forests in the Case alluded to, and the Commissioners under the Conventions with *France* for indemnifying *British* subjects for the confiscation of their Property by the *French* Revolutionary Government. (f)

I am of opinion that this Bill does not seek to interfere with any public duty which the Lords of the Treasury have to discharge, or with any discretion which they have to exercise in their capacity. But it seeks to restrain them from doing a mere ministerial act, with a view to secure the Money for the parties who may be decreed to be entitled to it.

(e) See *Rankin v. Huskisson*, Ante, Vol. IV. p. 13. See also 3 Mer. 102.

(f) *Hill v. Reardon*, Jacob's Rep. 84 ; and 2 Russ. 608.

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1833: 13th & 17th June.—*Covenant—Charge on Benefice.*

A Vicar, whilst the 13 Elizabeth, c. 20, against charging Benefices, was repealed, charged his Living with an Annuity, and covenanted if he should exchange his Living, to secure an Annuity by charging and demising the new Living, and that, in the meantime, it should be charged with the Annuity. He afterwards exchanged his Living, but did not execute any Deed until after the revival of the 13 Elizabeth. Held that the Covenant was a subsisting charge on the new Living, and a Receiver was appointed to provide for the Annuity.

By an Indenture of the 9th of August 1811, the Rev. *William Warrington*, the then Incumbent of the Vicarage of *St. Lawrence Jewry*, with the Rectory of *St. Mary Magdalen* in the city of *London* annexed, in consideration of 900*l.*, granted an Annuity of 150*l.* during his life, to *James Cottle*, charged, during his incumbency, on the Vicarage and Rectory; and, for better securing the Annuity, *Warrington* demised the Vicarage and Rectory to a Trustee for Ninety-nine years, if *Warrington* should so long live, and covenanted, with *Cottle*, for the payment of the Annuity, and, moreover, that in case he should, at any time or times thereafter, be preferred or promoted to any other Ecclesiastical Benefice or Benefices, in lieu of or in exchange for, or in addition to his then Vicarage and Rectory or his Church or Ecclesiastical Preferment for the time being, he would, at his own costs and charges, within three calendar months next after such events should happen, fully charge the same Benefice or Benefices with payment of the Annuity of 150*l.*, and also demise the same to a Trustee of *Cottle's* nomination, in the same manner, in all respects, as the Vicarage and Rectory were thereby charged and demised for securing the Annuity; and that, in the mean time, the same Benefice and Benefices should be charged and chargeable with and liable to the payment of the Annuity of 150*l.*; and, as a further security for the Annuity, *Warring-* [*225]
ton executed a Warrant of Attorney, dated the same 9th of August 1811, on which a Judgment for 1,800*l.* and costs was shortly afterwards entered up and docketed, and Memorials of the securities were duly enrolled in the Court of Chancery.

By an Indenture of the 12th of January 1813, *Cottle* in consideration of 800*l.*, assigned the Annuity and all the remedies for recovering the same, to the Plaintiff, and it was declared that the Trustee should stand possessed of the Residue of the term of Ninety-nine years, in Trust for securing the punctual payment of the Annuity to the Plaintiff.

The Annuity being in arrear, the Plaintiff, in Michaelmas Term 1813, sequestered the Benefices under the Judgment. In November 1814, and

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whilst the Sequestration was in force, *Warrington* exchanged those Benefices for the Vicarage of *Leake*, in the North Riding of *Yorkshire*; and, by an Indenture of the 10th of November 1818*, after reciting the Deed of August 1811 and the Covenant for charging any Benefice to be taken in exchange, he, in pursuance of the Covenant, charged the Vicarage of *Leake* with the Annuity and the Arrears thereof, and empowered the Plaintiff to distrain upon it, in the same manner as if it had been originally charged with the Annuity, and he demised the Vicarage to a Trustee, for Ninety-nine years, for better securing the Annuity. A Memorial of this Indenture was enrolled in the Court of Chancery; and, on the 30th of [*226] November 1818, another Memorial of it *was registered in the North Riding of *Yorkshire*. In and after April 1815, the Plaintiff caused several Sequestrations to be issued, under the Judgment, against the Vicarage of *Leake*.

On the 9th of August 1832, *Warrington* executed a Warrant of Attorney, on which a Judgment was, on the following day, entered up against him at the suit of the Defendants *Meggison Pringle & Manisty*, for 500*l.* and Costs. That Judgment was docketed and registered in the North Riding of *Yorkshire*, and a Sequestration was issued under it against the Vicarage of *Leake*; and, on the 7th of November 1832, *Meggison, Pringle & Manisty* obtained a Rule of the Court of King's Bench, calling on the Plaintiff to show Cause why the Sequestrations issued by him should not be suspended, and their Sequestration be put in force as from the 10th of August then last, and why it should not be referred to the *Master* to ascertain what Sums the Plaintiff had levied under his Sequestrations, and, if he had levied more than 1,800*l.* why he should not refund the Surplus, and pay to them the amount of their Debt and Costs, and cause satisfaction to be entered up on the Judgment obtained by *Cottle* against *Warrington*. Before the time for showing Cause had expired, the Bill was filed stating that, in April 1815 and at divers times since, the Plaintiff had caused divers Writs of *Sequestrari Facias* to be issued upon the first Judgment, for levying, out of the Vicarage of *Leake*, the Arrears of the Annuity which, from time to time, had become due, but that a large Sum still remained due to the Plaintiff in respect of the Monies to be levied by virtue of the several Writs, and in respect of the Annuity: that the Plaintiff was advised that, by [*227] reason of the first *Judgment not having been registered in the North Riding of *Yorkshire* previously to the registration of the second Judgment, the Plaintiff could not show Cause why the Rule should not be made absolute. The Bill charged that *Meggison, Pringle & Man-*

* It was alleged that the delay in procuring this Deed, was occasioned by *Warrington* being abroad.

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isty took their Security with notice of the Plaintiff's Annuity and of the Securities for the same; and that *Warrington* was in insolvent circumstances: and it prayed that the Annuity might be declared to be a valid Charge on the Vicarage of *Leake*, that an Account might be taken of the Arrears, that the Arrears and future Payments might be secured out of the Tithes and Profits of the Vicarage, that a Receiver might be appointed with directions, after providing for the Salaries of Curates, to apply the Surplus Profits in payment of the Annuity and the other incumbrances on the Vicarage, according to their priorities, and that the Archbishop of *York*, and *Meggison, Pringle & Manisty* might be restrained from granting, taking-out or proceeding in any Sequestrations against the Vicarage.

Meggison, Pringle & Manisty, in their Answer, said they did not know, but, from information obtained at the time and in the manner after-mentioned, they believed that a Deed dated the 9th of August 1811, was made between the Parties mentioned in the Bill, and that, thereby, *Warrington* granted an Annuity of 150*l.* to *Cottle*; but, save as aforesaid, they were unable to set forth what was the purport of that Deed, save that they were informed as after-mentioned that *Warrington* had secured the Annuity by a Covenant to pay the same: that they did not know, but, from the information they had obtained at the time and in the manner after-mentioned, they believed that *Warrington* executed the "Warrant of [*228] Attorney of the 9th of August 1811, and that the same was to the purport mentioned in the Bill; and they answered, in like manner, with respect to the Judgment entered up on the Warrant of Attorney, the Assignment of January 1813, the exchange of the Livings, and the Deed of November 1818; and they submitted that that Deed was invalid with reference to effecting any Charge on the Vicarage of *Leake*, and that the only valid Security which the Plaintiff had for his Annuity, was the Covenant for payment thereof contained in the Deed of August 1811. They then said that, in February 1832, they became *Warrington's* Solicitors in a Suit instituted by him relating to the Tithes of *Leake*, in which the Plaintiff was a Defendant, and, from the Papers which then came into their hands, they ascertained the several matters before-mentioned, and that the Plaintiff was in possession of the Vicarage under a Sequestration; but, on inquiring into the same, they learnt from *Warrington*, not only that the Sequestration and the Judgment had been satisfied, but that the Sequestration was illegal; for that the Plaintiff had levied not only the Arrears of the Annuity, but more than the amount for which the Judgment had been entered up, and that the Judgment had not been registered in the North Riding of *Yorkshire*, and the same was, therefore, void as against the Defendants, in respect to the Judgment obtained by them which had been duly registered: that, save as

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aforesaid, they had not, at the time when *Warrington* executed the Warrant of Attorney of August 1832, any notice of the Annuity or of the Securities for the same.

The Plaintiff now moved for an Injunction as prayed by the Bill.

[*229] *Mr. *Knight* and Mr. *Metcalfe*, in support of the Motion :

The Securities given for the Annuity were valid, inasmuch as they were executed after the passing of the 43 Geo. 3, c. 84, (which repealed the 13 Eliz. c. 20, against the charging of Benefices) and before the passing of the 57 Geo. 3, c. 99. *Doe v. Gully* (a). The Defendants, *Meggison & Co.*, as appears by their Answer, had notice of the Judgment and of all the other Securities for the Annuity. If the Court of

King's Bench shall decide that the Judgment has been satisfied, [*280] then we rely on the Covenant to charge in the Deed of *1811.

That Covenant is, in this Court, tantamount to an actual Charge at Law. As soon as the Exchange was effected, *Warrington* became a Trustee of the new Living for the Plaintiff.

[The Vice-Chancellor :—The 43 Geo. 3, repealed the 13 Eliz. Then the 57 Geo. 3, repealed part of the 13 Eliz., and the whole of the 43 Geo. 3, and, therefore, it revived so much of the 13 Eliz. as it did not expressly repeal. The consequence is that that part of the 13 Eliz. which relates to the charging of Livings, is now the Law of the Land.]

Mr. *Pepys* and Mr. *Purvis* for the Defendants, *Meggison & Co.* :

The Court of King's Bench decided, yesterday, that the Judgment for securing the Annuity, has been satisfied (b), and that *Meggison & Co.* are entitled to all the Sums which have been levied on the Vicarage since the 10th of August 1832. By the decision of the Court of Law, we are in possession of the Vicarage as Sequestrators ; and the object of the present

(a) 9 Barn. & Cress. 344. The 18 Eliz. c. 20, s. 1, makes void all chargings of Benefices with Cure, with any Pension or any Profit out of the same to be yielded or taken, except Rents reserved on Leases to be made according to the Act. The 14 Eliz. c. 11, s. 15, recites that sundry evil-disposed Persons had defrauded the true meaning of the before-mentioned Act, by Bonds and Covenants of suffering other Persons to enjoy Livings and the Fruits thereof, for that such Bonds and Covenants were not, in Law, taken to be Leases, although they amounted to as much : and it enacts that all Bonds, Contracts, Promises and Covenants for suffering or permitting any Person to enjoy any Benefice with Cure, or to take Profits or Fruits thereof, other than such Bonds and Covenants as should be made for assurance of any Lease theretofore made, should be, to all intents and purposes, adjudged of such force and validity, and not otherwise, as Leases by the same Persons made of such Benefices.

Both the above Acts were repealed by 43 Geo. 3, c. 84, s. 10. But the 57 Geo. 3, c. 99, (which was passed in 1817) repealed so much of the Acts of Elizabeth as related to Spiritual Persons holding of Farms, and to Leases of Benefices and Livings, and to buying and selling, and to residence of Spiritual Persons on their Benefices, and the whole of the 43 Geo. 3, c. 84.

(b) See *Cottle v. Warrington*, 5 Barn. & Adol. 447.

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application is to restrain us from exercising our Legal right. If the Plaintiff has an Equitable Lien, the application is improper; he ought to have moved for a Receiver. The Covenant, however, was never intended to be a permanent Equitable Charge. The concluding words of it operated only until a Deed was executed: and, when the Deed of November 1818 was executed, the Covenant was performed. If the Covenant remained unperformed, this Court would not decree a Specific Performance: no Action could be maintained upon it; for the Law has declared [*231] the act for the non-performance of which the Jury would have to assess the Damages, to be illegal. *Doe v. Gully* has no application; for, in that Case, the Estate had gone out of the Clergyman before the revival of the 13 Eliz. The Bill is framed on the supposition that the Judgment required registration. The Court of King's Bench, however, has decided the contrary (c), and, therefore, there is nothing left in the Bill on which the Court can give relief.

[The Vice-Chancellor:—I cannot say that I think so; for, if the Covenant in the Deed of August 1811, bound the newly-acquired Living until a Security should be given, as I think it did, and then a Deed was executed, which, by a subsequent alteration in the Law, was made a nullity, the Covenant would still remain in force. The doubt which I feel is whether, if the Plaintiff is entitled to take possession of the Living by virtue of the Covenant, this is the proper Motion to give him possession.]

Mr. Knight, in reply:

The Bill prays for a Receiver; and, as the Defendants appear, the Court can make an Order for a Receiver upon the present Motion. If a Party is in possession under two Titles, the one Legal and the other Equitable, and the Legal Title is impeached at Law, the Equitable Title ought not to be disturbed. At all events the Court will give the Plaintiff leave, either to amend his Notice of Motion, or to give a new Notice for a Receiver. The present Notice is dated the 22d April 1833, and it is owing to the state of the business of the Court that the Motion was not made earlier.

*The Court of King's Bench did not decide the point of Law [*232] until yesterday. The Plaintiff was in possession at the date of the Notice, and he still is in bodily possession:

The VICE CHANCELLOR:

The Court of King's Bench has held that the Plaintiff's Sequestration has been satisfied, and that the Defendants are entitled to possession of the Living as from the date of their Security; and, therefore, strictly speaking, the Plaintiff is not in possession. His proper course would have been to

(c) See 5 Barn. & Adol. 452, 453.

(d) 19 Ves. 455.

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move for a Receiver ; and I will allow him to give a Notice of Motion for that purpose.

The Plaintiff having given a Notice of Motion for a Receiver, that Motion was now made by Mr. *Knight* and Mr. *Metcalf*.

Mr. *Pepys* and Mr. *Purvis*, for the Defendants :

The Plaintiff is now endeavouring to enforce his Lien, against our Judgment at Law. In order to give priority to a registered Deed over an unregistered one, actual Notice must be clearly proved, amounting to Fraud ; constructive notice is not sufficient. *Wyatt v. Barwell* (d). We admit Notice of the date of the Deed of August 1811 ; but we deny that we had any knowledge of that part of it by which the Equitable Lien was created.

The Court of King's Bench has decided that the Plaintiff has received, from his Sequestrator, more than the amount of his Judgment.

[*233] *The VICE-CHANCELLOR :

In *Wyatt v. Barwell*, the Party had not notice of the Deed in question, but only of another Instrument which referred to it. In this Case however, it appears, by the Answer, that *Meggison & Co.* had distinct notice of the Deed of August 1811.

It has been stated that the Court of King's Bench has decided that the Plaintiff has been overpaid on his Judgment, and that all the Sums which have been levied since the 10th of August 1832, ought to be paid over to *Meggison & Co.* But, notwithstanding that Decision, my opinion is that, if the Covenant in the Deed of 1811 operates upon the Living so as to make a prior Charge, (as I conceive it does,) although the Plaintiff has been overpaid on the Judgment, he is entitled to retain what he has received until it appears that he has been overpaid the Arrears of the Annuity. And, therefore, I shall make an Order, on the former Motion, to restrain the Defendants *Meggison & Co.* from further proceeding on the Rule at Law, and I shall also grant the Motion for a Receiver.

Meggison & Co. moved the Lord Chancellor (Lord *Brougham*) to discharge the above Order. But his Lordship affirmed the Order, with the exception of that part of it which restrained *Meggison & Co.* from proceeding on the Rule at Law.

In pursuance of the Lord Chancellor's Decision, the Plaintiff paid, to

(d) 19 Ves. 435.

1533.—Metcalf v. The Archbishop of York.

Meggison & Co., 80*l.* in respect of the proceeds of the Living which occurred between *the 10th of August 1832, and the ap- [*234] pointment of the Receiver.

The Plaintiff then filed a supplemental Bill, stating the proceedings which had taken place in the King's Bench and in Chancery since the filing of the original Bill, and the payment of the 80*l.*, and praying that *Meggison & Co.* might be declared Trustees, for the Plaintiff, of that Sum and of any other Sums which they might have received from the Living of *Leake*, and might pay over the same to the Plaintiff, and that the Receiver might be continued during *Warrington's* life.

The original and supplemental Suits now came on to be heard.

Mr. *Knight* and Mr. *Metcalf* for the Plaintiffs.

Mr. *Jacob* and Mr. *Purvis* for the Defendants *Meggison & Co.*

The Equities of the original and supplemental Bills are quite opposite to each other. The original Bill proceeded on the ground of the non-registration of the Plaintiff's Judgment, and on that ground only. By the supplemental Bill the Plaintiff seeks to enforce a Title as Equitable Mortgagee. But it is a settled rule that a Mortgagee, whether he be a Legal or an Equitable Mortgagee, cannot have an Account of by-gone Rents; and the Plaintiff never set up his Title as an Equitable Mortgagee, until he applied for a Receiver. The Plaintiff now asks for a Receiver, not such as is granted on Motion, but for a Perpetual Receiver. He does not ask directly, for a specific performance of the Covenant to charge, because it is illegal and void; but *he asks for it indirectly. The Cases at Law have proceeded on the [*235] 13 Eliz. c. 20, only; because it was sufficient for the purpose of deciding those Cases, to look at that Act alone. But the 14 Eliz. c. 11, s. 14, goes further, and extends to all Contracts and Covenants for permitting any Person to enjoy any Benefice with Cure or to take the Profits or Fruits thereof. In *Brewster v. Kidgill* (e), Lord *Holt* says: "If a man covenant to do a thing which is lawful at the time of the making, and an Act come afterwards and make the thing covenanted to be done unlawful, such an Act is a repeal of the Covenant." In *Barker v. Hodgson* (f), Lord *Ellenborough* says: "If indeed the performance of this Covenant had been rendered unlawful by the Government of this Country, the Contract would have been dissolved on both sides, and this Defendant, inasmuch as he had been thus compelled to abandon his Contract, would have been excused for the non-performance of it, and not liable to Damages." Supposing that the Covenant would not be held to have been satisfied at Law by the execution of the Deed of November 1818, still no Action could be maintained upon it, as it has become illegal. How then is this Court to deal with it?

(e) 12 Mod. 166; see 6 Vin. Ab. 419, Covenant [R.] (f) 3 M. & S. 267.

 1833.—*Metcalf v. The Archbishop of York.*

[The *Vice-Chancellor* :—The Living of *Leake* was acquired before the 13 Eliz. c. 20, was revived; and, in the Deed of August 1811, *Warrington* covenants that all future Livings shall be charged with the Annuity notwithstanding he may have done no act to charge them.]

[*236] A Court of Equity considers a Covenant as an "Agreement only. It only interferes on the ground of Contract and with a view to decreeing a Specific Performance. In all Cases, the question which this Court has to deal with, is whether the Contract is or is not capable of Specific Performance. If the Court cannot execute the Contract, it will not appoint a Perpetual Receiver, which would be doing indirectly what it cannot do directly, and would be not only an evasion, but a violation of the Law. The meaning of the maxim that what is agreed to be done is to be considered in this Court as done, is that the Court will decree a specific performance of the Contract, when called upon: but it is not a rule of this Court that a Contract which it has no power to perform specifically, shall be considered as performed. *Bettesworth v. The Dean and Chapter of St. Paul's* (g). The Plaintiff is not, altogether, without remedy; for, whenever the Annuity is in arrear, he may bring an Action against *Warrington*, and take out a Sequestration under the Judgment.

It is said that *Meggison & Co.*, before they took their Security, had notice of the Deed of 1811. But if they then had any such notice, they had, at the same time, notice that no Claim was made by the Plaintiff under that Deed, but only under his Sequestration; and notice of a Deed under which a Party does not claim, goes for nothing,

The supplemental Bill prays that *Meggison & Co.* may be declared to be Trustees, for the Plaintiff, of the Monies received by them. Suppose that they had received 500*l.* under their Sequestration, and were [*237] to "be declared Trustees of it for the Plaintiff; the effect would be that their Sequestration would be satisfied, and yet their Debt would remain undischarged, and the Plaintiff would be paid through the medium of their Sequestration: therefore, in that mode, no relief can be given.

Mr. *Cockerell* for the Archbishop of York.

Mr. *Bellamy* for the Executors of *Cottle's* Trustee:

The VICE-CHANCELLOR, after reading the Covenant to charge in the Deed of August 1811, said: The only question which I have to decide, is whether the concluding words of this Covenant did, in the contemplation of this Court, take effect on the new Living as soon as it was acquired, so as to create a valid Charge upon it. My opinion is that those words did immediately

(g) 1 Bro. P. C. 240; S. C. 2 Eq. Ab. 26.

1833.—Oldaker v. Lavender.

fasten on the new Living, and that it was not necessary for the Covenantee to resort to the machinery of a new Charge, unless he chose to be at the expense of it. The Annuity was granted for a valuable consideration, and the Charge was equally good whether the Annuitant did or did not afterwards obtain a complete execution of the Covenant.

This is like those Cases in which Parties, on their marriage, have agreed that their Estates, generally, shall be liable to pay a Jointure. Such an Agreement operates, immediately, to charge all the Estates which the Parties have, although no formal Charge is subsequently executed.

If the Plaintiff had filed his Bill he might have had a Decree prior to the passing of the 57 Geo. 3; and, "if he did not choose [*238] to have a Charge, this Court would have protected him by its Decree. If the Covenant operated as an immediate Charge, the effect is the same as if a formal Charge had been made, which the subsequent Act could not set aside.

There can be no doubt that *Meggison, Pringle & Manisty* had notice of the Deed of August 1811 before they took their Security; and though, probably, neither they nor the Plaintiff were, at the time, fully aware of the Legal effect of that Deed, they must be taken to have had notice of it to all intents and purposes; and, therefore, the Plaintiff has now a right to have that Deed put in force. The consequence is that, as against those Gentlemen, the Plaintiff is entitled to be considered as the first Incumbrancer on the Vicarage of *Leake*. He was in possession under his Sequestration, and they applied to a Court of Law and turned him out of possession; but, as he was turned out of possession contrary to the effect of the Covenant, this Court will consider him as being in possession *ab initio*; for this Court will put Parties into the situation in which they ought to have been. The Money which the Defendants have received from the Plaintiff, must be paid back, and, if any Profits have been received under the second Sequestration, those Profits also must be paid over to him so far as to cover the Arrears of the Annuity; and, in order to provide for the future payments, the Receiver must be continued.

*OLDAKER v. LAVENDER.

[*239]

1833: 22d June.—Partnership.—Fraud.—Account.

By Articles of Partnership it was agreed that just and true Accounts should be made out, half yearly, and signed by the Partners, and that such Accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the Partners. The Accounts were made out by one of the Partners; and, after the death of two of the other Partners, it was discovered that the Accounts were fraudulent. Held that the fourth Partner was entitled to have the Accounts of the Partnership taken from the date of the Articles.

1833.—Oldaker v. Lavender.

ON the 12th of April 1823, Articles of Partnership were entered into by Messrs. *Oldaker, Lavender, Day & Murrell*, who, for some years before, had been Partners, as Bankers, at *Evesham in Worcestershire*, by which they agreed to continue in Partnership for 14 years from the date of the Articles, if they or any two of them should so long live; that, on the 1st of July then next, and on the 31st of December and 30th of June in every succeeding year, they would make up a just and true Account in writing, of all the Monies and Effects then due and owing or belonging to the Partnership, and of all Debts due and owing from the same, and would, thereupon, cause the true particulars of every such Account, and the Rest or Balance thereof to be entered in a book to be kept for that purpose, and that each of the Partners should subscribe his name in the book at the foot of every such Account, and, after every such Account should be so entered and subscribed, the heads of the same should be drawn out and written in four distinct papers, each of which should contain the heads of such stated Accounts, and should be thereupon signed and subscribed by all the Partners, and one of such papers should be delivered to each Partner; that, after the finishing and adjusting such Account as aforesaid, the clear profits of the Partnership should be divided into four equal shares, and one share should be paid to each Partner; that if at the time of making up such

[*240] Accounts as aforesaid, any debt due to the Partnership should, in the estimation of the Partners, be desperate or doubtful, a valuation should be put thereon, and the amount of such valuation be carried to the Joint Stock for the benefit of the then Copartners, and in case such debt should afterwards produce more than the valuation, the overplus should belong to such of the Copartners as should be in the trade when the same should be received, and no part thereof should belong to any Partner or the representative of any Partner who should have died previous to the receipt of such overplus; that, *after such Accounts should be so from time to time made out and signed, the same should never afterwards be called in question on pretence of any error therein or otherwise*, unless some manifest error or mistake therein should appear, and *that in the lifetime of all the Partners, and before the expiration of the Partnership*; that, in case any of the Partners should die before the expiration of the Partnership, the Survivors should pay to his Representatives his share of the Rest or Balance upon the settling of Accounts up to the half-yearly day of account last preceding his death, in case the same should not have been previously received by him, but his Representatives should not be entitled to any share of the Property or Produce of the business subsequent to such last half-yearly day of account; that, in case any debt due to the Partnership which, at the time of the last half-yearly settlement of Accounts previous to the

1833.—*Oldaker v. Lavender*.

secession or death of any Partner, should have been considered to be a good debt, should, within six months after such settlement of Accounts, become bad or desperate, the seceding Partner, or the Representatives of the deceased Partner, should be subject to the loss that might happen thereby, in the same manner as if he had been living and continued a Partner; and *Murrell* agreed with his Co-partners that he would, during the continuance of the Partnership, manage the business and keep the necessary Books of Account, to the best of his knowledge, skill and ability.

Murrell, who was the active Partner and Superintendent of the Books and Accounts and the Cashier of the Bank, made up and furnished to his Co-partners the half-yearly Accounts: but none of those Accounts, except that of the 1st of July 1823, were signed by *Lavender*, and the heads of the same were not drawn out and written on four distinct Papers and signed as directed by the Articles.

Lavender died in June 1829, and *Day* died on the 13th of February 1830.

Oldaker having become desirous that the Partnership should be put an end to, employed one of the Clerks in the Bank to investigate the Accounts; and it was then discovered that the half-yearly Accounts which had been made out by *Murrell*, were, in many respects, false and fictitious, and contained many fabricated items, and that he had applied the Funds of the Bank to his own use, to a very large amount. In consequence of this discovery, it was agreed that the Partnership should be dissolved, and that *Murrell* should assign his Share in the Partnership Estate and Effects to *Oldaker*, for the purpose of enabling the latter to wind up the affairs of the Partnership; and that agreement was carried into effect by a Deed of the 16th of June 1830. Whilst *Oldaker* was proceeding to wind up the Partnership affairs, he discovered that, beyond the loss occasioned by *Murrell's* Frauds, there was a large loss arising from bad debts, including a debt due from *Murrell* for money lent to him by the Partnership, and from insufficient Securities taken by him, and also from debts represented by him to be good, but which were either bad at the time, or afterwards proved so. By reason of these losses, the assets of the Partnership were not nearly sufficient to discharge the demands upon it; and *Oldaker* advanced a large sum, out of his own private Monies, in discharge of those demands. On the 2d of March 1831, *Oldaker* died.

The Bill was filed by *Oldaker's* Executors and Devisees, against *Murrell* and the Executors and Devisees of *Lavender* and *Day*, stating that *Murrell* was in Insolvent circumstances, and was wholly unable to satisfy the debt due from him to the Partnership: that the Estates of *Lavender* and *Day*

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ought to bear a fair proportion of the losses occasioned by *Murrell's* frauds and misapplications of the Partnership effects, as also by bad debts and insufficient securities, or by any other causes, and that their Estates ought to be charged with a fair proportion of the losses sustained up to the half-yearly day of settling Accounts preceding their respective deaths. The Bill charged that as none of the Balance Sheets, except the first, were made out and signed as directed by the Articles, the same were not binding on any of the Partners, and that those Balance Sheets were altogether fraudulent and void. And the Bill prayed a declaration to that effect, and that the Partnership Accounts might be taken from the date of the Articles; that *Murrell* might account for the sums taken by him out of the [*243] Partnership; that the losses sustained from the date of the Articles, including the funds misapplied by *Murrell*, might be ascertained, and that it might be declared that the Real and Personal Estates of *Lavender* and *Day* were liable to bear a due proportion of such losses, and to reimburse *Oldaker's* Estate a due proportion of the amount paid by him, out of his own Monies, in satisfaction of the Partnership Debts.

The Defendants, the Executors and Devisees of *Lavender* and *Day*, stated, in their Answers, that their Testators entertained no doubt as to the fairness and accuracy of the Accounts made out by *Murrell*; and that, though those Accounts were not made out and signed as directed by the Articles, they were adopted by the Partners: and they submitted that the Accounts made out on the day of Settlement last preceding the deaths of their respective Testators, ought to be deemed settled Accounts and binding on all the then Partners and their Representatives; and they claimed the full benefit thereof as stated Accounts, in the same manner as if they had pleaded the same.

On the Cause being called on, the Defendant's Counsel objected to its being then heard, because a Daughter of one of the deceased Partners, who was made a Defendant as being entitled to a Share of her late Father's Real Estate, had made a Settlement of her Property and married, pending the Suit.

But the *Vice-Chancellor* said that the marriage of a Female Defendant was not an abatement of a Suit; that the Settlement had been made *pendente lite*, and that the Plaintiffs might, if they pleased, have the Cause [*244] heard and take a Decree, and then, if necessary, file a Supplemental Bill to bring the Husband and the other Parties to the Settlement before the Court.

The preliminary objection having been overruled,

Sir *E. Sugden*, Mr. *Knight* and Mr. *Lynch*, for the Plaintiffs, contended, first, that the Partnership Accounts had not been made out as required by

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the Articles ; and, secondly, that it clearly appeared, from the provisions of the Articles, that the Parties did not mean to provide against wilful errors, or contemplate any Fraud to be committed by one Partner against the others.

Mr. Rolfe and Mr. Jacob, for the Defendants the Executors and Devises of *Lavender and Day* :

The Articles stipulate that no Account shall be called in question, except for error discovered in the lifetime of all the Partners. How does it vary the case, as between the innocent Partners, that the error has been caused by Fraud? The guilty Partner, certainly, could not avail himself of that stipulation ; but the other Co-partners have been in error as amongst themselves ; and, as two of them died before the error was discovered, the loss must be borne by the survivors. Suppose that the Debits of the Partnership had been stated too highly, could the Representatives of the deceased Partners have made any Claim on Account of such mis-statement? One of the provisions in the Articles is materially in favour of the surviving Partners: for, if one of the Partners had died on the 29th of June, the whole half-year's Profits would have belonged to the Survivors.

Next, as to the Accounts not having been made out *and signed as directed by the Articles. *Lavender* was the only [*245] one of the Partners who did not sign the Accounts ; and, therefore, his Representatives are the only Persons who can complain that the Accounts were not binding on him. But they make no such complaint. The provision in the Articles as to the settlement of Accounts, was partly substantial, and partly directory. The substantial part was complied with ; the form was waived by the Parties themselves. They substituted their own mode of Settlement for that pointed out by the Articles. By receiving their Shares of the Profits they adopted the Accounts ; and it cannot now be said that they are not bound by them. *Pettyt v. Janeson* (a) : *Jackson v. Sedgwick* (b).

At all events, if the Estates of the deceased Partners are at all responsible for the Losses, the Plaintiffs are not entitled to have a general Account taken, as prayed by their Bill ; they are only entitled to correct the Accounts so far as they are fraudulent.

Mr. Stinton appeared for the Defendant *Murrell*.

The VICE-CHANCELLOR :

The Stipulations in the Articles, as to the mode in which the Executors of a deceased Partner are to be dealt with, proceed on the supposition that the stipulation that just and true Accounts shall be made out, has been complied with. If, however, by reason of the Fraud of one of the Partners, just and

(a) Madd. & Geld. 146.

(b) 1 Swanst. 460.

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true Accounts have not been made out, the ground on which the
 [*246] subsequent stipulations are founded, totally fails; and the *want
 of truth and justice in the Accounts, lays a foundation for taking
 a general Account.

Refer it to the *Master* to take an Account of the dealings and transactions of the Partnership, from the date of the Articles.

 TAYLOR v. TAYLOR.

1833: 25th June.—Will.—Construction.—Residuary Gift.

Testator, after directing all his Debts to be fully paid, devised his Real Estates to several different Persons, and charged certain of them with specific Sums. Held that those Estates, as well as the others, were charged with the Debts.

A Bequest of "All my Household Furniture, Implements of Trade, Cattle, Sheep, and all the rest and residue of my Monies, Securities for Money and Personal Estate whatsoever and wheresoever, not hereinbefore disposed of," is a Residuary Bequest.

WILLIAM TAYLOR, being seised of the Copyhold Estates mentioned in his Will, but of no other Real Estates, made his Will dated the 17th of July 1818, and which was partly as follows: "First I will and direct that all my just Debts and Funeral Expenses shall be fully paid and satisfied. I give and devise, unto my Son *William Taylor*, his Heirs and Assigns, all my Copyhold Messuage or Tenement, Closes, Lands, Hereditaments and Premises, situate in the Manor of *Balsal*, in the County of *Warwick*, and now in the occupation of myself and *John Ward*, To hold the said Messuage or Tenement, Closes, Land, Hereditaments and Premises, with their Appurtenances, unto my said Son *William Taylor*, his Heirs and Assigns for ever, subject nevertheless to, and I do hereby expressly charge the said Premises with the payment of 40*l.* a-piece to my Four Daughters, *Ann*, the wife of *Richard Butler*, *Mary*, the Wife of *John Hammond*, *Sarah*, the Wife of *John Ward*, and *Elizabeth*, the Wife of *John Boddington*." The Testator then devised three other Copyhold Estates, one to his Son,
 [*247] *Samuel Taylor* in Fee, another *to his Wife, *Mary Taylor* for life, with remainder to his Sons, *Thomas* and *Abraham Taylor*, as Tenants in Common in Fee, and the third to his Son, *Joseph Taylor*, in Fee charged with the payment of the further Sum of 40*l.* a-piece to his four Daughters; and he gave to them the further Sum of 40*l.* a-piece, and directed the same to be paid out of his Personal Estate: and he gave to his Sons, *William* and *Samuel*, the Sum of 400*l.* in Trust for his Wife for life, and, after his death, for his Sons, *Thomas* and *Abraham* on their attaining 21, but if they both died under that age, then in Trust for such of

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his other Children as should then be living. The Will then proceeded thus: "And as to all *my Household Furniture, Implements of Household, Implements of my Trade, Stock in Trade, Cattle, Sheep, Implements in Husbandry, and all the Rest and Residue of my Monies, Securities for Money, and Personal Estate whatsoever and wheresoever*, not hereinbefore by me disposed of, I give and bequeath the same and every part thereof, unto my said Wife and my said Sons, *Thomas Taylor and Abraham Taylor*, in equal Shares and Proportions; and I direct that the Share or Shares of both or either of my said two Sons who may be under the age of 21 years, shall be employed, by my Executors hereinafter named, for the benefit of such Son or Sons, during his or their minority, in such manner as my said Executors shall think proper." And the Testator appointed his Sons, *William and Samuel*, Executors of his Will. The Testator, by his first Codicil, dated the 12th of July 1822, reduced the Sums given to his Daughters to 30*l.* each; and, by the second Codicil, dated the 21st of June 1823, he further reduced those Sums to 20*l.* each; and he gave to his Son, *Samuel*, the Sum of 100*l.*, which he directed should be paid out of the *Residue* of his Personal Estate. [*248]

"The Testator died in April 1826. The Bill was filed by *Thomas and Abraham Taylor*, the two younger Sons (the latter of whom was an Infant), and by *Mary Taylor* the Widow of the Testator, against the other Children, praying that the Will might be established and the Trusts performed.

At the hearing of the Cause two questions were raised; first, whether the Copyhold Estates were charged with the Testator's Debts and Funeral Expenses; and second, whether the Household Furniture and other Articles particularly mentioned in the Clause by which the Residue was disposed of, were specifically bequeathed, or not?

Sir *E. Sugden* and Mr. *Jeremy*, for the Plaintiffs, contended, first, that, by the first Clause in the Will, all the Testator's Estates were charged with his Debts. *Bradford v. Foley* (a); *Webster v. Alsop* (b), Secondly, that the Clause in which the Residue was included, was partly specific and partly Residuary; for, if the Testator had intended it to be Residuary only, he would not have enumerated the Household Furniture and other Articles, or, if he had enumerated them, he would have added: "And all the Rest and Residue of my *other* Personal Estate." *Clarke v. Butler* (c).

Mr. *Wakefield* and Mr. *Harwood*, for the Defendants, contended, first, that the effect of the first Clause in the Will was controlled by the subsequent Charges; and that the Testator had pointed out the Estates which he intended to be charged, and the Charges to which they [*249]

(a) 3 Bro. C. C. 351, note.

(b) Ibid.

(c) 1 Mer. 304.

 1833.—Taylor v. Taylor.

were to be subjected. *Willan v. Lancaster* (d); *Henvell v. Whitaker* (e). Secondly, that the Household Furniture and other Articles were not specifically given; for the Clause by which they were disposed of, comprised one Bequest only, and contained merely an enumeration of the particulars of which the Residue consisted.

The VICE-CHANCELLOR:

The general charge of all the Debts upon all the Estates, is quite consistent with the charge of specific Sums upon the particular Estates; and, therefore, I consider it to be quite clear that all the Estates are charged with the Debts.

The next question is whether, by the words of the Residuary Clause, the Articles mentioned were specifically given, or whether that Clause contained merely an enumeration of the particulars of which the Residue consisted. This question is not decided by *Clarke v. Butler*. There the Gift was divided into two distinct sentences, and the Judgment as to all the things not connected with the Leasehold House, though given in a weak form, is supported by the Gift in the second Codicil. The language of this Will is different. Here there is no division of the sentence. The things specifically named cannot be separated from those given in general terms.

Then follow this Clause: "And I direct that the Share or Shares of both or either of my said two Sons who may be under the age of [*250] 21 years, shall be employed, *by my Executors hereafter named, for the benefit of such Son or Sons, during his or their minority, in such manner as my said Executors shall think proper." Supposing the things mentioned to be specifically given, this would be a direction that the Executors should employ the Sons' Shares of those things, that is to say, of the Cattle, Farming Implements, &c. for the benefit of his Sons, which the Testator could not intend; but, if the Gift was Residuary, then the Executors would convert those Articles into Money, and the Testator might, with propriety, direct his Executors to employ the Shares of his Sons for their benefit.

My opinion, therefore, is that the Testator did not intend, by mentioning those Articles, to give them specifically, but that he meant merely to describe the Residue of which the Shares were given to his Sons.

(d) 3 Russ. 108.

(e) Ibid. 343.

1833.—Lewis v. Edmund.

*LEWIS v. EDMUND.

[*251]

1833: 26th June.—*Multifariousness.*

A. died Intestate leaving a Widow, and Infant Children his Next of Kin. The Widow, without taking out administration, possessed his Assets, paid his Debts, and died, having bequeathed her Personal Estate to the Children, and appointed *B. & C.* her Executors. *D.* then took out Administration to the Intestate and brought an Action, as Trustee for the Children, against *B. & C.* for Monies alleged to be due from the Testatrix to the Intestate's Estate. *B. & C.* together with the Children, filed a Bill against *D.* praying for all proper Accounts of the Assets of the Intestate and Testatrix, possessed by *B. and C.*, and by *D.*, and of what, if anything, was due from the Testatrix's Estate to the Intestate's Estate, and for an Injunction to restrain the Action. Held that the Bill was not Multifarious.

THE Bill stated that the late Father of the Infant Plaintiffs, held, at his death, two small Farms, at the rack-rents of 20*l.* and Ten Guineas; that he died in February 1829, intestate, leaving his Widow, and the Infant Plaintiffs his only Children and Next of Kin; that the Widow possessed his Personal Estate, which consisted, principally, of Farming Stock and Furniture, and paid his Funeral Expenses and Debts; that she continued to occupy the Farms at the same Rents, and maintained and brought up the Infant Plaintiffs thereon; that she died in March 1832, having bequeathed all her Personal Estate to the Plaintiffs, *Lewis and Thomas*, in Trust to dispose of the same for the benefit of her Children, equally, in such manner as they should think best for their maintenance, education and establishment in life, and she appointed *Lewis and Thomas* her Executors in Trust and the Guardians of her Children; that they proved her Will, and let the Farms and sold the Stock, Furniture and Effects thereon, and, with the Proceeds and other Monies received by them as her Executors, they paid her Funeral and Testamentary Expenses and Debts, and *they invested part of the Surplus in the Purchase of Stock in [*252] their names, and had a Balance remaining in their hands; that the Defendant was an Uncle of the Infants, and, at the Testatrix's death he was a day labourer, and, being desirous of possessing himself of part of the Trust-monies, he, under pretence of benefiting the Infants, made certain proposals for the employment of those Monies, which the Executors declined; that the Executors had sent to a Solicitor employed by the Defendant, an account of their Receipts and Disbursements, and that no objection had been made thereto; that, in November 1832, the Defendant took out Administration to the Intestate, and, afterwards, applied to the Executors for payment of two-thirds of the Assets possessed by them, as belonging to the Intestate's Estate, and, subsequently, for payment of 120*l.* for the purpose of stocking a Farm which the Defendant alleged had been taken for the Infants, but the Executors declined to pay the Sums demanded;

1833.—Lewis v. Edmund.

that the Defendant, as Administrator, had brought two Actions against the Executors, one for the Rent of the Farms during the Testatrix's occupation, and for Money received by her after the death of the Intestate, and alleged to be his Property, and the other for the Proceeds of the Sale of the Stock and Furniture sold by the Executors, which was alleged to belong to the Intestate's Estate; that no Debts remained due from the Intestate's Estate, and that the Residue of his Estate, including what, if anything, might be due from the Testatrix, or might be recoverable in the Actions, *belonged to the Infants, and the Defendant professed to bring the Actions as a Trustee for them and for their benefit*; that the Plaintiffs, *Lewis and Thomas*, were willing to dispose of the Stock and Cash in their

[*253] hands, "as the Court should direct, and, in case any part thereof should appear to belong to the Intestate's Estate, the same ought to be secured for the benefit of the Infants; that the Defendant had been arrested for Debt, and had taken the benefit of the Insolvent Debtors' Act, and, if he should get possession of any part of the Trust-monies, he intended to apply the same to his own use. The Bill prayed that the Trust-monies in the hands of the Plaintiffs *Lewis and Thomas*, might be properly secured and applied for the benefit of the Infants; that all proper Accounts might be taken of the Estates of the Intestate and Testatrix, respectively, possessed by the Plaintiffs, *Lewis and Thomas*, and by the Defendant, and of their Debts, and Funeral and Testamentary Expenses, *and of what, if anything, was due from the Testatrix's Estate to the Intestate's Estate*, and that the Defendant might be restrained from taking any further proceedings in the Actions.

The Defendant demurred to the Bill because it was exhibited to have an Account taken of the Intestate's Estate possessed by the Defendant, and also of the Testatrix's Estate possessed by the Plaintiffs, *Lewis and Thomas*, which matters had no dependence on or connection with each other, and ought not to have been included in one Bill.

Mr. *Knight* and Mr. *Monro*, in support of the Demurrer, contended that the Accounts of the two Estates could not be joined in one Suit, as the Defendant had no interest in the Accounts of the Testatrix's Estate, nor had the Plaintiffs *Lewis and Thomas* any interest in the Accounts of the Intestate's Estate. **Harrison v. Hogg* (a); *Dunn v. Dunn* (b); *Maud v. Acklom* (c); *Marcos v. Pebrer* (d). [*254]

Mr. *Knight* and Mr. *Jacob* appeared for the Plaintiffs.

But the VICE-CHANCELLOR, without hearing them, said: The Bill represents such circumstances as show that the Court cannot administer relief, without taking the accounts of both Estates.

(a) 2 Ves. J. 323.

(b) *Ante*, Vol. II. p. 329.

(c) *Ante*, Vol. II. p. 331.

(d) *Ante*, Vol. III. p. 466.

1833.—*Jones v. Torin.*

The Mother and Children were the sole Next of Kin of the Father, and she was his Administratrix *de son tort*. She appoints the Plaintiffs *Lewis* and *Thomas* her Executors; and, after her death, the Defendant *Edmund* takes out Letters of Administration to her deceased Husband, and then brings Actions against the Representatives of the Widow, which, the Bill alleges, he professes to bring as Trustee for and for the benefit of the Infant Co-plaintiffs, who are entitled to the Personal Estate both of their Father and of their Mother. If the Defendant succeeds in these Actions, the effect will be that the Administrator of the Father will recover from the Executors of the Mother, who was the Administratrix *de son tort* of the Father. The Executors of the Mother have a right to have the Accounts taken of the Estate which they represent, and the Infant Plaintiffs have a right to file a Bill for the purpose of restraining the Defendant from proceeding in the Actions, to the fruits of which, it is alleged, they alone are entitled. The Defendant, by bringing the Actions, has implicated himself *with the Estate of the Mother; and the Court cannot administer relief with reference to those Actions, unless the Accounts of the Mother's Estate are taken. The consequence is that the Bill is not Multifarious, and the Demurrer must be over-ruled.

JONES v. TORIN.

1853: 3d July.—*Will.—Construction.*

Testator bequeathed a sum of 6,000*l.* in Trust for his Daughter for life, "and, on her decease, I give the said 6,000*l.* to the Children, or their descendants, of *T. F.* in such proportions to each as my Daughter may direct." The Daughter died without having made any appointment. Held that the Children of *T. F.* were entitled to the Fund, to the exclusion of their Issue.

CHARLES FREEMAN, after, by his Will, giving certain Legacies to *Thomas Freeman* and *Nicola Sophia* his Wife, bequeathed as follows: "I give and bequeath to my Executors hereinafter named, 6,000*l.* Three per Cent. Consolidated Bank Annuities, upon this Trust that they do pay the Dividends that become due and are paid on the said 6,000*l.* now standing in my name in the Bank, to my Daughter *Charlotte Sarah*, Wife of Captain *Henry Gamble*; and I desire that her Receipt alone, whether married or unmarried, shall be considered a complete discharge for all such Dividends during her natural life; and, immediately on her decease, I give and bequeath the said 6,000*l.* Three per Cent. Consolidated Annuities to the Children, or their Descendants, of the aforesaid *T. Freeman* and *Nicola Sophia* his Wife, in such proportions to each as my Daughter the said *Charlotte Sarah Gamble* may by her Will or Testament, or any other written declaration,

1833.—*Brown v. Pocock.*

during her lifetime, direct." And the Testator appointed *W. C. Freeman* his Residuary Legatee, and *Torin* and *Baker* his Executors.

[*256] *The Testator died in 1823 ; and *Mrs. Gamble* died in 1832, without having made any appointment of the 6,000*l.* Stock.

The Bill was filed by two of the Children of *Thomas Freeman* and *Nicola Sophia* his Wife, against *W. C. Freeman*, who was the only other Child, and also against the Executors of the Testator and the Children of the Plaintiffs, alleging that, on the death of *Mrs. Gamble* without having made any appointment with respect to the 6,000*l.* Stock, the same became divisible between the Children of *T. Freeman* and *Nicola Sophia* his Wife in equal Third parts ; but the Defendant *W. C. Freeman* alleged that *Mrs. Gamble* having made no appointment with respect to the Stock, the same was undisposed of after her Life-interest therein, and fell into the Residue ; and the Defendants, the Children of the Plaintiffs, alleged that they took equal Shares in the Stock with the Plaintiffs. The Bill prayed that the Plaintiffs might be declared to be respectively entitled to one Third part of the Stock, and that the Executors might be decreed to pay the same accordingly.

Sir *E. Sugden* and Mr. *Barlow*, for the Plaintiffs, relied on *Montagu v. Nucella* (a).

Mr. *L. Lowndes* and Mr. *Winterbottom*, for the Defendants, the Children of the Plaintiffs, distinguished this Case from the Case cited, on the ground that, in this Case, a Power was given to *Mrs. Gamble*, under which she might have appointed a Share of the Fund to the Descendants [*257] of the Children ; and, therefore, that *the Children and their descendants were entitled to the Fund equally. *Brown v. Higgs* (b).

The VICE-CHANCELLOR :

The descendants are mentioned merely as substitutes for the Children. There is a direct Gift, with a power of selection.

Declare that the Plaintiffs and the Defendant *W. C. Freeman*, are entitled to the Fund in equal Shares.

(a) 1 Russ. 165.

(b) 8 Ves. 561.

BROWN v. POOCK.

1833 : 6th July.—*Will.—Construction.—Power.*

Testatrix gave a weekly sum to *A.* for his Life or until he should attempt to assign, &c. the same, and she directed a sum of Stock to be set apart to answer the Payments ; and she gave to *A.* the power of leaving the Stock, after the Payments to him should cease, to and for the benefit of his Wife and Children, as he should, by Will duly executed, give and be-

1833.—Brown v. Pocock.

queath the same. A. died having made an invalid appointment of the Stock. Held that there was an implied Gift to his Wife and Children, in default of appointment.

LADY POCK, by her Will dated the 21st of July 1816, directed her Executors to pay two Weekly sums of 2l. each, to *John James Brown* and *James Edward Brown*, for their lives, and that 8,000l. Three per Cents. should be set apart, and the Dividends applied for payment of those Weekly sums; but, if either of the Legatees should attempt to assign, charge or incumber his Weekly payment, the same should cease, and, upon each Weekly payment ceasing, either for the causes before-mentioned or by the Legatee's death, a Moiety of the Stock should be [*258] transferred to the Corporation for the relief of Poor Widows and Children of Clergymen. The Testatrix, by a Codicil dated the 6th of July 1817, revoked the Gift of a Moiety of the 8,000l. Stock, to the said Corporation, after the Weekly payment to *James Edward Brown* should cease, and she gave to him the power of leaving that Moiety, after the payment to him should cease, to and for the benefit of his Wife and Children, in such manner as he should, by Will duly executed, give and bequeath the same.

The testatrix died on the 6th of July 1818.

By a decree on further Directions, it was ordered that the amount of the Weekly payments should be paid to the Legatees, out of the Dividends of 8,000l. Three per Cents. which had been transferred into the Accountant-general's name.

James Edward Brown died in October 1832. He had four Children living at the Testatrix's death (one of whom afterwards died) and two Children born after the Testatrix's death: his Wife also was dead.

James Edward Brown having made an invalid appointment of a Moiety of the Stock, the question on the hearing of a Petition in the Cause, was to whom that Moiety now belonged.

Sir *E. Sugden* and Mr. *Cooper*, for the surviving Children of *James E. Brown*, contended that the power given by the Codicil, was either a power in the nature of a Trust, or a power with an implied Bequest over to the objects of it, in default of appointment. [*259]

Brown v. Higgs (a); *Harding v. Glyn* (b); *Birch v. Wade* (c); *Davy v. Hooper* (d); *Maddison v. Andrew* (e); *Hockley v. Mawbey* (f); *Morgan v. Surman* (g); *Longmore v. Broom* (h).

Mr. *Pepys*, for the Executors of the Testatrix, contended that the Fund had fallen back into the Residue of her Estate.

Mr. *Monro*, for the Executors of *James Edward Brown*.

(a) 5 Ves. 561.

(b) 1 Atk. 469.

(c) 3 V. & B. 198.

(d) 2 Vern. 665.

(e) 1 Ves. 58.

(f) 1 Ves. J. 143.

(g) 1 Taunt. 289.

(h) 7 Ves. 124.

1833.—Gibbons v. Langdon.

THE VICE CHANCELLOR :

The Codicil contains no express Gift over in default of Appointment ; but it is clear that the Testatrix intended the Wife and Children to take the Fund, and, therefore, I am of opinion that there is a Gift to them, by implication, subject to the Power.

Declare that the surviving Children of *James Edward Brown* are entitled to a Moiety of the Stock, as Joint-tenants.

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*GIBBONS v. LANGDON.

1833: 23d July.—Will.—Construction.—Portions.

Testator gave a Sum of Stock to his Wife for life, and, after his death, to his Sons and Daughter; and he directed the Interest of his Daughter's Share to be paid to her for her separate use, for life, and, at her decease, the Capital to be divided amongst such Children as she should have living at his decease, the Shares of Sons to be paid at 21, and of Daughters at 21 or marriage, provided their Mother was then dead, otherwise, her Children's Shares were not to be paid to them until her decease: but if the Testator's Daughter had no Children living at her decease, her Share was to be equally divided amongst such of his Sons as should be then living: and if any of his said Sons and Daughters should die before his Wife, and without leaving Issue, their Shares were to be divided among his other Children. Held that the Daughter's Children living at the Testator's death, took absolute vested interests at 21, though their Mother was still living; and that her Interest in the Share of one of the Testator's Sons who died in the lifetime of his Widow, was not subject to the same Trusts as her original Share, but vested in her absolutely.

MOSES VERNON, by his Will dated the 25th of April 1799, bequeathed as follows: "I give and bequeath unto my Son *Joseph Vernon* and Mr. *John Cockran*, the Sum of 2,800*l.* Three per Cent. Consolidated Bank Annuities, in Trust to pay unto my beloved Wife, *Ann Vernon*, the Interest, Dividends and Profits accruing therefrom, during her life; and, at her decease, the said Sum of 2,800*l.* I desire may be divided, equally, Share and Share alike, between and among my three Sons and my daughter as follows, *Joseph Vernon*, *William Vernon*, *Henry Vernon* and *Maria Ann Vernon*, now *Maria Ann Smith*, the Wife of *James Smith*, but the Interest only of my said Daughter's Share is to be paid her, during her life, by my said Trustees, from time to time as it becomes due, and my said Daughter's Receipt alone, from time to time, shall be a sufficient and lawful dis-

[*261] charge to my said Trustees, notwithstanding her present or any other Coverture; and, at the decease of my said Daughter, my will is that her said Share shall be equally divided, Share and Share alike, between or among such Children lawfully begotten as she shall have living at my decease, or born within nine months after, such Children as are Sons

1833.—Gibbons v. Langdon.

are to be paid their Principal Money upon their attaining the age of 21 years, and such children as are Daughters *are to be paid their Principal Money upon their attaining 21 years* or day of marriage, respectively, whichever shall first happen, provided my said Daughter is then dead, otherwise, her Children's Share is not to be paid them until after my said Daughter's decease; but, if my said Daughter should happen to die before any of her Children shall have attained the age of 21 years, or, if any of them are Daughters, should have attained the age of 21 years or day of marriage respectively, whichever shall first happen, my Will is that my said Trustees shall apply the Interest towards such Children's education and maintenance, if only one Child, to that Child: *if my said Daughter has no Children living at her decease*, in that case, her Share is to be equally divided, Share and Share alike, between and among such of my said Sons as are then living or their Issue: *but if any of my said Sons and Daughter should happen to die before my said Wife and without leaving any Issue, such Share or Shares is to be equally divided among my other Children*; but if all my Children should die without Issue before my said Wife, in that case, the said Sum shall be paid to my next of Kin, after my said Wife's decease, by my said Trustees or the Survivor of them and the Executors and administrators of such Survivor."

"The Testator died in April 1800, leaving the several Persons [*262] named in his Will him surviving. *William Vernon*, one of the Sons, died in the lifetime of the Testator's Widow, an Infant, and without Issue. The Widow died in June 1823, leaving *Joseph and Henry Vernon*, and Mrs. *Smith* her surviving. The only Children of Mrs. *Smith* who were living at the Testator's death, were *Henry Smith* and *Maria Ann Smith*, who had long ago attained 21. In 1815, the daughter married *Thomas Hawley*, who died in 1828. In May 1832 Mrs. *Hawley* took the benefit of the Insolvent Debtors' Act, and the Plaintiff, who was her Assignee, conceiving that she was entitled to a Moiety of one Third of the 2,800*l.* Stock, in Reversion expectant on the decease of her Mother, caused her Interest to be put up to Auction. It was described, in the Particulars of Sale, as "All the *vested Right and Interest* of the Insolvent, under the Will of her Grandfather, in and to the Sum of 933*l.* 6*s.* 8*d.* Three per Cent. Consolidated Bank Annuities, standing in the names of respectable Trustees, to a *Moiety* of which the Insolvent will be entitled on the demise of her Mother, a Lady aged 63 years." The Defendant, who was the Purchaser at the Auction, having refused to complete his Purchase on the ground that the Insolvent's Interest was mis-described in the Particulars and that the Plaintiff could not make a good Title, the Bill was filed to compel a Specific Performance.

1833.—Gibbons v. Langdon.

Sir *E. Sugden* and Mr. *Girdlestone* Junior, for the Plaintiff :

The Will gives the Property to the Testator's Widow for life, and, after her death, to the Sons and Daughter equally. The daughter being married, her Share is given to her for her separate use during her life, and, after her death, it is to be equally divided between such Children as she should have living at the Testator's death ; and such of them as are Sons are to be paid their Shares at 21, and such of them as are Daughters, at 21 or marriage, provided the Daughter should be then dead, otherwise her Children's Shares are not to be paid to them until her death. Provision is then made for the maintenance of the Children if the Daughter should die before any of them should attain 21, or, being Daughters, before they should attain that age or be married. Then follow these words : " If my said Daughter has no Children living at her decease, in that case, her Share is to be equally divided, Share and Share alike, between and among such of my Sons as are then living or their Issue." The Testator meant that, if his Daughter should die and leave no Child who should become entitled under the preceding Trusts, then her Share should go over ; but if a Child attained 21 (and Mrs. *Hawley* has long since attained that age), then it is not to go over.

The rule is, to presume that a Legatee is to have an absolute Interest at the time when he is to have a beneficial Interest. The Shares are to be paid at 21, and there is a Provision for Maintenance. The Court will mould the words of the Will so that, if a Child does take a Share, it shall not be deprived of it, if it dies in the lifetime of the Mother. *Schenck v. Legh* (a).

Mr. *Knight* and Mr. *Rogers*, for the Defendant :

[*264] A Title that is doubtful merely, is not to be forced upon a Purchaser. *Jervoise v. The Duke of Northumberland* (b). The Testator directs the payment of the Shares of his Daughter's Children, in words which would not affect the vesting of them. He then goes on to say, " If my said Daughter has no Children living at her decease, &c." Can it be said that no two judicial minds can differ upon the Construction of this Will ? If the Court is not prepared to say so, it cannot force the Title on the Purchaser.

There is another objection which, at all events, is unanswerable. It is assumed that Mrs. *Hawley* will, on her Mother's death, become entitled to a Moiety, of one Third of the 2,800*l.* Stock. That Fund is divisible into Thirds, in consequence of the death of *William Vernon* : but Mrs. *Hawley* takes no Interest in the Share which *William Vernon* would have been en-

(a) 9 Ves. 300.

(b) 1 Jac. & Walk. 559.

1833.—Gibbons v. Langdon.

titled to ; for the accrued Share is not settled in the same way as the original Shares, but is vested, absolutely, in Mrs. *Smith* and the other surviving Children of the Testator.

Sir *Edward Sugden*, in reply :

The Testator intended the accruing Share to be held in the same way as the original Shares. He says that, if any of his Children should happen to die, their Shares shall be divided amongst his other Children. He meant that if any one of his Children should die, the Share of that Child should be withdrawn so as to increase the original Shares, and that it should go as part of the original Fund. The Testator has, in effect, said that if any one of his Children died, the Fund should be divided in Thirds.

*The VICE CHANCELLOR :

[*265]

I do not entertain any doubt that, under the Words of this Will, Mrs. *Hawley* has an absolute, vested Interest in a Moiety of her Mother's original Share. The Direction that, at the decease of the Testator's Daughter, her Share shall be equally divided amongst such Children as she should have living at his decease or born within nine Months after, is so clear as not to admit of any doubt. The Testator next deals with the mode of applying the Shares which he had previously given. He directs that such of the Children as are Sons, are to be paid their Principal Money upon their attaining 21, and that such of them as are Daughters, are to be paid their Principal Money upon their attaining, that age or day of marriage, provided his Daughter is then dead, otherwise, her Children's Shares are not to be paid them until after his Daughter's death. The words "her Children's Share," must mean the Share of the Children who are to take under the previous Gift. He then directs that, if his Daughter dies before any of her Children attain 21, or, if any of them are Daughters, before they attain that age or day of marriage, his Trustees shall apply the Interest towards such Children's Education and Maintenance. It is manifest that, here also, he means such Children as were to take under the prior description. Then the Bequest over is, merely, of that which was before given, in case the prior Legatees did not take : and, if there had been nothing more in this Case, I should have made a Decree that the Purchaser should take the Title.

The Testator, however, goes on to say : " But, if any of my said Sons and Daughter should happen to die before my said [*266] Wife, and without leaving any Issue, such Share or Shares is to be equally divided among my other Children ;" and there the matter rests ; so that the Share of *William Vernon*, who died in the lifetime of the Testator's Widow, is, by express words, given to the surviving Sons and Daughters absolutely ; and it would be nothing but conjecture if I were to

1833.—North v. Martin.

say that the Testator meant his Daughter to take her Share with the same Limitations over to her Children as her original share was subject to.

I am of Opinion, therefore, that the second objection is well founded, and that a good Title cannot be made.

Bill dismissed.

NORTH v. MARTIN.

1833: 3d July.—Deed.—Construction.

By a Marriage Settlement, Estates were limited to the Wife and the Husband, for their lives, with Remainder to the Heirs of the Husband on the body of the Wife, and their Heirs, and, if more Children than one, equally to be divided among them as Tenants in Common; and, for default of such Issue, to the Wife and her Heirs. Held that the Husband did not take an Estate in Tail Special, but for life only, and that the Children took, by Purchase, as Tenants in Common in Fee in remainder.

By an Indenture dated the 23d of November 1759, being the Settlement made previously to the marriage of *Mary Doughty* with *John Elwick*, after reciting the intended marriage, and that the Lady was seised in Fee and possessed of the Freehold, Copyhold and Leasehold Estates therein mentioned, it was witnessed that, in consideration thereof, and for settling [*267] a competent Jointure on *Mary Doughty* and making provision for her, out of her own Lands and Tenements, in case she survived her intended Husband, she conveyed the Freehold Estates to *T. Brooke* in Fee, to the use, after the marriage, of *J. Elwick* for life, with remainder to the use of *Brooke* and his Heirs, during the life of *Mary Doughty** in Trust to preserve the contingent Uses and Estates thereinafter limited, but nevertheless to permit *J. Elwick* and his Assigns to receive the Rents during his life, with remainder to the use of *Mary Doughty*, for her life for her Jointure and in lieu, with the Copyhold Lands, of her Thirds and Dower out of any part of the Real Estate of *J. Elwick*, and, after the decease of the Survivor of *J. Elwick* and *Mary Doughty*, to the use of the Heirs of the body of *J. Elwick* on the body of *Mary Doughty* to be begotten and their Heirs, and if more Children than one, equally to be divided among them, to take as Tenants in Common and not Joint Tenants, and for default of such Issue, and *Mary* should survive her intended Husband, to the use of *Mary* and her Heirs for ever, but, if she should die before *J. Elwick*, without Issue, then to the use of *J. Elwick* and his Heirs for ever, and with full power and authority for *Mary*, in such case, either by Will or Deed in writing, to charge all the

* So in the Settlement.

1833.—North v. Martin.

before-mentioned Premises with the payment of 100*l.* to such Person or Persons, in such manner and for such uses as she should direct and appoint : and *Mary Doughty* covenanted with *Brooke*, to surrender the Copyhold Estates to such and the like uses, intents and purposes as were therein-before expressed concerning the Freehold Estates, and charged and chargeable, with the Freehold Estates, as the same were thereinbefore charged, and to be in further *part of her Jointure and in full of her [*268] Dower: and she assigned the Leaschold Estates to *Brooke*, in Trust for the uses before expressed of the Freehold and Copyhold Estates as far as the Law allowed, and also subject to the above charge with the Freehold and Copyhold Estates.

The marriage took effect ; and *J. Elwick* survived his Wife, and died in 1810. There were Ten Children of the marriage, all of whom survived their Father.

The Bill alleged that the Children, on their Father's death, became entitled to vested Estates, in equal undivided parts, as Tenants in Common, of and in the Freehold, Copyhold and Leaschold Premises comprised in the Settlement, for absolute Estates therein according to the several qualities and tenures thereof, and that the Children were admitted to the Copyhold Premises: that the Shares of the Children in all the Estates, had been conveyed, surrendered and assigned to the Plaintiff; and the Plaintiff had lately contracted to sell the Estates to the Defendant, who refused to perform the Contract, alleging that the Children had no power, under the Settlement, to convey, surrender and assign the Estates, by reason that *John Elwick* and *Mary*, his Wife, took an Estate Tail therein, and that the same, upon the death of *J. Elwick*, vested in *John Elwick*, the eldest Son of the Marriage, as Tenant or Issue in Tail thereof, and, therefore, the Plaintiff was unable to make a good Title thereto. And the Bill prayed for a Specific Performance of the Contract.

The Defendant put in a general Demurrer.

*The Parties having agreed that the question should be decided [*269] by the *Vice-Chancellor* :

Mr *Preston*, in support of the Demurrer, said that, by the Settlement, an Estate in Tail Special was created in favour of *John Elwick* the Father: that the general rule was that the words "Heirs of the body," were to be taken in their natural sense, unless there was something, in the context of the Settlement, which rendered it imperative on the Court to read them in some other sense. *Wright v. Jesson* (a). In that Case the word "Children" occurred: Here the general intent requires that the words "Heirs of the body" should be construed in their technical sense; for, if those

1833.—North v. Martin.

words were to be taken to mean "Children," the death of a Child would defeat the Limitations over to the Wife and Husband, and would prevent the Lady from making a Provision on a second marriage. If the Child were to die, the Estates would go to the Heir of that Child *ex-parte Paternâ*, to the exclusion of the Father and Mother: and, if there were more than one Child, there would be no cross Remainder between them. Moreover, in the Limitation over, the words, "for default of such Issue," are used.

There are various Cases in which there has been a Gift to Heirs of the body, with words of Limitation superadded, and, notwithstanding, the words "Heirs of the body," have been taken in their technical sense. *Franklyn v. Lay* (b); *King v. Burchell* (c); *Kinch v. Ward* (d); *Doe v. Harvey* (e).

[*270] "Mr. O. Anderdon, in support of the Bill:

The construction of words in Marriage Settlements, is different from what it is in other instruments where the consideration of marriage does not occur. By holding that the Children take as Purchasers, it is put out of the Parent's power to defeat them. In *Wright v. Jesson*, no words of Limitation were engrafted on the words "Heirs of the body." There is no particular force in these words, where, as in this Case, words of explanation are added. *Hodgeson v. Bussey* (f); *Theebridge v. Kilburne* (g).

The VICE-CHANCELLOR:

Here there are all the elements of a Case, which would call upon the Court to decide that the first taker took an Estate in Tail Special. But then there are the words, "and if more Children than one," which must be taken to be interpretative of the words, "Heirs of the body." If those interpretative words had not been used, the Husband, notwithstanding the superadded words of Limitation, would have taken an Estate in Tail Special. But no Case has been cited, nor do I recollect any, in which the words, "Heirs of the body," have been held to create an Estate Tail, where those words of interpretation have been used.

If the interpretative words are to be allowed to operate, the effect of the argument founded on the Limitation over, "for default of such Issue," will be done away; for those latter words must be construed to mean, "for default of such Children."

[*271] "The consequence is that the Demurrer must be overruled; and I shall declare that the Children of the marriage took, by

(b) *Ibid.* 59, Note.

(d) 2 Sim. & Stu. 409.

(f) 3 Atk. 89.

(c) Amb. 379. S. C. 1 Eden, 424.

(e) 4 Barn. & Cr. 610.

(g) 3 Ves. 233.

1833.—*Prentice v. Mensal*.

Purchase, Estates in Fee, as Tenants in Common, in the Freeholds and Copyholds, and the absolute Interest in the Leaseholds (*h*).

PRENTICE *v.* MENSAL.

1833: 8th July.—*Report*.—*Mistake*.

In taking Accounts directed by the Decree, certain Payments which had been made by *A.* and *B.* jointly, were represented and reported by the *Master* to have been made by *B.* separately. After the Report had been absolutely confirmed, and *B.* had become Bankrupt, the Court, on the Petition of *A.* discharged the Order to confirm the Report, and referred it back to the *Master* to review his Report.

THIS Suit was instituted by the Infant Children of *W. Prentice*, deceased, to have an Account taken of his Personal Estate possessed by the Defendants, *Mensal* and *Vose*, his Executors.

The Defendants employed the same Solicitor to defend the Suit for them. In taking the Accounts directed by the Decree, certain payments were represented to have been made by *Vose*, separately; and the *Master*, in his Report dated the 12th of December 1831, gave *Vose* credit for such payments accordingly. On the 11th of January 1832, the Report was absolutely confirmed. In May 1832, *Vose* became Bankrupt. *Mensal* having discovered, on examining the Schedules to the Report, that certain payments which had been made by him and *Vose* jointly, were therein stated to have been made by *Vose* separately, presented a Petition pointing out the Errors in the Report, and stating that the Order for confirming it absolutely, had been made without his knowledge, and praying that that Order might be discharged, that it might be referred back to the *Master* to re-take the Accounts, or to review his Report in re- [*272] spect of the particulars therein mentioned, and to make a further corrected Report.

Sir *E. Sugden* and Mr. *Wray*, in support of the Petition.

Mr. *Knight*, Mr. *Rolfe*, Mr. *Hetherington* and Mr. *Rogers*, *contrà*.

The Executors put in their Examination, in 1830. In 1831, the *Master* made his Report, which *Mensal* permitted to be absolutely confirmed. So long as *Vose* was solvent, it was immaterial to *Mensal* in which form the payments were stated. In 1832 *Vose* became Bankrupt, and then the Report is objected to. The intervening Bankruptcy is a reason for not correcting the Errors. *Mensal* and *Vose* employed the same Solicitor; and *Mensal* may, if he pleases, bring an Action against the Solicitor. The Infant Plaintiffs ought not to suffer from *Vose's* Insolvency.

The *Vice-Chancellor* discharged the Order for confirming the Report,

(*h*) See *Preston* on Est. 359, *et seq.*

 1833.—Attorney-General v. Mayor of Rochester.

gave leave to *Mensal* to carry in objections to the Report, and referred it back to the *Master* to review his Report, and to carry on the Accounts directed by the Decree, from the foot of the Report; and ordered *Mensal* to pay the Costs of the Application and of the Order to confirm the Report, and the Cost of the Day.

[*273] *THE ATTORNEY-GENERAL v. THE MAYOR OF ROCHESTER.

1833: 22d July.—*Charity*.—*Decree*.

A Testator devised his Real Estates to Trustees, in Trust to dispose of the Rents for the benefit of the Poor of the City of *R.* and the Limits and Precincts thereof. The Trustees having applied the Rents for the benefit of the Poor of one only of the Parishes in the City, an Information was filed on behalf of two other Parishes, claiming to participate in the Charity, and a Decree was made in 1680, directing that the Rents, should, for ever thereafter, be divided amongst the three Parishes in certain proportions. In 1808 an Information was filed on behalf of a fourth Parish, for a similar purpose; and that Parish was decreed to be entitled to a Share of the Rents, in the proportion of its extent and population to the extent and population of the three other Parishes; but the proportions, as between those Parishes, were not to be altered. An Information was afterwards filed on behalf of one of those three Parishes, claiming an increased Share of the Rents, on account of its population having increased more than the population of the other Parishes. But the Information was dismissed, the Decree of 1680 being final.

By the Will of *Richard Watts*, dated in 1579, and by an Indenture of the 26th of April, in the 35th year of Queen *Elizabeth*, Estates were vested in the Mayor and Corporation of *Rochester*, in Trust to apply the Rents in providing and maintaining an Almshouse within the City of *Rochester*, for Six Poor Travellers, being no common Rogues or Proctors, to lodge in, nightly, and also in providing Flax, Hemp, Yarn, Wool, and other necessary stuff, to set the Poor of the City and the Precincts and Limits thereof to work, according to the Purview of the Statute made, in the 18th year of the Reign of Queen *Elizabeth*, for setting the Poor to work, and the avoiding of Idleness, and for the further Relief of such as should be poor and impotent.

The Corporation of *Rochester* having, for several years, applied the Rents of the Estates, after providing *for the Charity for Travellers, for the benefit of the Poor of the Parish of *St. Nicholas* only, within the City and Liberties, in 1673 an Information on behalf of the Poor of the Parishes of *St. Margaret* and *Strood*, was filed against the Corporation, for the purpose of having a Share of the Rents applied for the relief of the Poor residing in such parts of those Parishes as were situate within the Limits, Liberties or Precincts of the City: and,

 1833.—Attorney-General v. Mayor of Rochester.

by a Decree made by Lord *Nottingham*, C. in 1676, it was declared that those parts of the two last-mentioned Parishes that were within the Limits, Liberties or Precincts of the City, ought to have a proportion as well of the Work as of the surplus Rents of the Estates, after providing for the Travellers' Charity, according to the then present Revenue and future improvement thereof; and certain Referees were appointed to set out such proportions.* The Referees, accordingly, by their Award dated in 1680, set out and allowed, to the Poor of *St. Margaret's* within the Liberties, Limits and Precincts of the City, for their Share of the Work and surplus Rents, 30*l.* a year, and six Thirtieth Parts of any future improvement of the Rents; and, to the Poor of *Strood* within the same Liberties, Limits and Precincts, 20*l.* a year, and four Thirtieth Parts of the future improvement of the Rents; and they set out and allowed, the remaining Twenty Parts, to the Corporation, to be employed by them for the relief of the Poor Travellers and of the Poor of *St. Nicholas*; and they directed that, in case of future diminution of the Rents, there should be a proportionate abatement out of the Shares allowed to *St. Margaret's* and *Strood*.

In 1680 the Award was confirmed, and it was ordered that the Poor of those parts of *St. Margaret's* and *Strood* that were [*275] within the Limits, Liberties and Precincts of the City of *Rochester*, should, *forever ever thereafter*, have a Share and Proportion, as well of the work as of the surplus Rents of the Charity Estates, according to the then Revenue thereof, and, thereafter, according to such improvement as should, at any time thereafter, be made thereof, *in such manner and proportion as by the Award was appointed*.

In 1808, an Information was filed at the relation of the Parish Officers of *Chatham*, claiming to be entitled to participate in the Charity, on the ground that part of that Parish was within the Liberties and Precincts of *Rochester*. By a Decree made in 1810, by Sir *W. Grant*, M. R., it was referred to the *Master* to inquire whether any and what part of the Parish of *Chatham*, was within the City of *Rochester*, or the Liberties, Limits and precincts thereof; and whether there were any other Parishes or parts of Parishes within the same, besides *Chatham*, *St. Nicholas's*, *St. Margaret's* and *Strood*. The *Master* reported that a certain portion of the Parish of *Chatham* was within the Liberties, Limits and Precincts of *Rochester*, but that there were no other Parishes or parts of Parishes within the same besides *Chatham* and the three other Parishes. The Report having been confirmed, the Court declared, in 1812, that the Parish of *Chatham* was entitled, from the filing of the Information, to Participate, in the Charities established by the Will and the Deed, with the City of *Rochester* and the other Parishes

* See *Ca. Temp. Finch*, 193.

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within that City and the Liberties, Limits and Precincts thereof, in the proportion that the extent and population of that part of the Parish of *Chatham* which was within the City and the Liberties, Limits and Precincts thereof, bore to the other Parishes or parts of Parishes also within the same: and it was referred to the *Master* to ascertain what proportion of the Rents of the Charity Estates ought to be applied for the benefit of *Chatham*: but, in making such appointment, the *Master* was to consider the Decree of 1676 and the Award, as ascertaining and establishing the proportions as between the Parishes of *St. Margaret* and *Strood* and the City of *Rochester* and *St. Nicholas* as between each other; but this was to be without Prejudice to any application, on behalf of the City and the Inhabitants of either of the Parishes of *St. Nicholas*, *St. Margaret* and *Strood*, to vary such proportions.

The *Master* having made his Report, the Court, in 1822, ordered the Rents to be divided into thirty-two parts and two of such parts to be paid to *Chatham*, six to *St. Margaret's*, four to *Strood*, and the remainder to the Corporation, for the support of the Travellers' Charity and for the relief of the Poor of *St. Nicholas*.

When the Award was made, the Parish of *St. Nicholas* contained a larger population than *St. Margaret's*, but, since that time, the population of the latter had (as it was alleged) increased in a greater ratio than the population of any of the other Parishes, and the inhabitants of that part of it which is within the Liberties of the City, had become more numerous, by upwards of 2,000, than the inhabitants of *St. Nicholas*, whilst the expense of the Travellers' Charity had increased in a very trifling degree, and did not exceed 120*l.* per annum.

The Rents of the Charity Estates having also greatly increased since the making of the Award, an Information was filed in 1829, at the relation of the Parish Officers of *St. Margaret's*, praying that a new Apportionment of the Rents of the Charity Estates, might be made, and that a fixed annual Sum, or else a fixed proportion of the Rents might be allowed for the maintenance of the Travellers' Charity, and that the Residue might be divided among the Parishes of *St. Margaret*, *St. Nicholas*, *Strood* and *Chatham*, in proportion to the present population of *St. Nicholas*, and of such parts of the other Parishes as were within the Liberties of *Rochester*.

The Attorney-general, Mr. Knight and Mr. Longley, for the Relators:

All the Poor of the City of *Rochester* were the objects of the Founder's bounty. No Parish is mentioned either in the Will or in the Deed of the 35th of *Elizabeth*.

We do not ask anything that militates against the Decree of 1680. The

 1833.—Attorney-General v. Mayor of Rochester.

Court, when it made that Decree, meant to make an equal distribution of the Rents amongst the Poor of *Rochester*. As the population of *St. Margaret's* has greatly increased, an unequal distribution will take place, if no alteration is made in the proportion of the Rents allotted to that Parish. Under the Decree of 1680, the Poor of *St. Margaret's* were entitled to six Thirtieth parts of the Rents; but, by the Decree of 1822, their Share was reduced to six Thirty-second parts. Those two Decrees cannot stand together. The Decree of 1812 was made, expressly, without prejudice to any Application, on behalf of the City and the Inhabitants of any of the Parishes, to vary the Proportions.

*Sir *E. Sugden*, Mr. *Pepys* and Mr. *Ching*, for the Mayor [*278] and Corporation :

Your Honor has no jurisdiction to alter the Decree of 1680. The time has elapsed within which a Decree of this Court can be altered. Why is not that Decree to be final, as it would have been if it had been made in a Suit between individuals? It contemplates and provides for an increase as well as a diminution of the Rents; and it expressly orders that the Poor of those parts of *St. Margaret's* and *Strood* that are within the Liberties of *Rochester*, shall, *for ever thereafter*, have a share of the Charity, according to the then Revenue thereof, and, thereafter, according to such improvement as should, at any time thereafter, be made thereof, *in such manner and proportion as by the Award was appointed*. The proportions in which the Rents were ordered, by the Decree of 1680, to be divided amongst the parishes of *St. Margaret's*, *St. Nicholas* and *Strood*, remained unaltered by the Decree of 1822.

The VICE-CHANCELLOR :

This a very simple Case.

At the time when Lord *Nottingham's* Decree was made, it was not known that any Parish, except *St. Nicholas's*, *St. Margaret's* and *Strood*, was within the City and Liberties of *Rochester*; and it is clear, from the language of that Decree, that it was intended to bind the right as between those Parishes. After the great lapse of time since that Decree was pronounced, there is no authority in the Court of Chancery to alter it.

*Sir *W. Grant*, when he made the Decree of 1810, did not [*279] infringe on the spirit of Lord *Nottingham's* Decree, but acted on it. He directed the *Master* to inquire whether any and what part of the Parish of *Chatham*, was within the City or Liberties of *Rochester*, and whether there were any other Parishes or parts of Parishes, within the City or Liberties. It is clear, therefore, he meant (consistently with what Lord *Nottingham* had decreed) if there were any such other Parishes or parts of Parishes, to allow them to participate in the benefits of the Charity. The

1833.—Taylor v. Tabrum.

Master having found that part of the Parish of *Chatham* was within the Liberties of the City, the *Master of the Rolls*, by the Decree of 1812, declared that the Parish of *Chatham* was entitled to participate in the Charity, in the proportion that the extent and population of that part of it which was within the Liberties of the City, bore to the other parishes. Sir *Wm. Grant*, therefore, merely declared what would have been declared by Lord *Nottingham* in 1676, if it had been known, at that time, that part of the Parish of *Chatham* was within the Liberties of the City: and all that his *Honor* did, was to direct the *Master* to ascertain what proportion of the Rents ought to be applied for the benefit of the Parish of *Chatham*, leaving the other Parishes to divide what was not taken from them, in the same proportions as they had before divided the whole. Consequently, the Decree of the *Master of the Rolls* was in affirmance of Lord *Nottingham's* Decree.

It was not necessary for Sir *W. Grant* to decide whether there should be any variation in the proportions, with respect to the remaining Parishes.

The inhabitants of *St. Margaret's*, however, carefully abstained [*280] from making any application to vary the proportions; and, in my opinion, no Judge in this Court had power to vary the proportions.

It must have been foreseen that the relative populations of the Parishes would vary; and therefore, Lord *Nottingham* declared, for the sake of convenience, that the proportions should, for ever thereafter remain as specified by the Award. *Summum Jus* would indeed be *summa injuria*, if, at the end of every five years, a fresh Information should be filed, and the *Master* be directed to compute the number of Paupers in each Parish.

I admit that, to a certain extent, the Testator's intention was violated by Lord *Nottingham's* Decree; but it has been long acted upon. What is now asked is to depart from the spirit of the Decree, and therefore this Information must be dismissed with Costs.

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*TAYLOR v. TABRUM.

1833: 24th July.—*Plaintiff*.—*Amendment*.

A Bill was filed against two Trustees, alleging that one of them only had acted in the Trusts, and seeking to charge that Trustee only with a Breach of Trust. The Trustees, in their Answer, admitted that they had both acted in the Trusts. The Plaintiffs, however, did not amend their Bill. Held, that they were nevertheless entitled to charge both the Trustees with the Loss occasioned by the Breach of Trust.

Trustees.—*Costs*.—Trustees, who were directed to sell an Estate as soon as conveniently might be after their Testator's death, refused, by the desire of one of the Parties interested, an offer of 6,600*l.* for the Estate; but they afterwards sold it for 3,600*l.* The Court charged them with the Loss, but gave them their Costs, as their conduct had been wilful and perverse.

THE Testator in this Cause, devised a Mill and other Premises to the De-

1833.—Campbell v. Harding.

fendants, *Hart* and *Tabrum*, in Trust to sell the same as soon as conveniently might be after his death.

The Testator died in 1818. At that time the Mill was let on a lease (which expired at Michaelmas 1823), at the rent of 400*l.* *per annum*. Soon after the Testator's death, the Trustees caused the property to be put up at auction, and 6,000*l.* were then bid for it; but it was not then sold, as one of the parties interested in the proceeds of the Sale, desired that it might not be sold for less than 7,000*l.* A few days after the auction, the Trustees were offered 6,000*l.* for the property, but they declined the offer; and, in 1823 they sold it for 3,600*l.*

The Bill alleged that *Hart* had not acted in the execution of the Trusts of the Will, and prayed that *Tabrum* alone might be charged with the loss arising on the sale. *Hart* and *Tabrum* put in a joint Answer, admitting that they had jointly acted in the execution of the Trusts and in the sale of the Mill and Premises. *The Plaintiffs, however, did [*282] not amend their Bill; and, on the hearing of the cause, one question was whether they were entitled to charge *Hart* as well as *Tabrum* with the difference between 6,600*l.* and 3,600*l.*, notwithstanding the Bill remained unaltered.

The Vice-Chancellor, on the authority of *Atwood v.* — (a), held that the Plaintiffs were entitled to charge both the Trustees with the difference, although it would have been more proper if they had amended their Bill.

With respect to the Costs of the Trustees, His Honor said that, though there had been some misconduct in the Trustees, it had not been wilful or perverse, and therefore, they ought to have their Costs (b).

Sir E. Sugden, and Mr. Wheatley appeared for the Plaintiffs, and, Sir C. Wetherell, Mr. Knight, Mr. Barber and Mr. Parker, for the Defendants.

*CAMPBELL v. HARDING.

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1833: 30th July.—Practice.—Feme Covert.

An Order for payment to the Husband, of Money to which his Wife is entitled, cannot be inserted in the Order on further directions, but must be obtained by Petition, although the Wife consents.

On this Cause coming on for further directions, a married Lady, who was entitled to some of the Funds in the Cause, attended to consent to waive

(a) 1 Russ. 353.

(b) See *Tells v. Carpenter*, 1 Madd. 290.

1833.—*Harmer v. Westmacott.*

her Equity to a Settlement; and it was said that her consent might be then taken, and the Order for payment of the Funds to her Husband, be made part of the Order on further directions, there being the usual Affidavit that no Settlement had been executed.

But the *Vice-Chancellor*, after consulting the Registrar, said that the Order for payment of the Funds to the Husband, could not be included in the Order on further directions, but must be obtained by Petition. His *Honor*, however, said that he would take the Lady's consent *de bene esse*.

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*HARMER v. WESTMACOTT.

1833: 27th, 29th & 30th July.—*Public Policy.*

A. the Proprietor of a Newspaper, prevailed on B. to make and deliver to the Stamp-office, an Affidavit that he, B., was the Proprietor of the Paper. B. afterwards agreed to sell the Paper to D. A. having become insolvent, his Assignees filed a Bill to set aside the Sale for Fraud. Held, that as B. had at A.'s instance, violated the 33 Geo. 3, c. 78, which requires the true Names of the Proprietors of Newspapers to be inserted in the Affidavit, his Assignees were not entitled to the Relief asked.

IN 1827, *W. D. Richards*, who was the original Proprietor of *The Age Newspaper*, being confined in the King's Bench Prison, and thinking it expedient that the name of the Proprietor should be changed, prevailed on *S. Bowden*, who was a journeyman printer in the Establishment, to allow himself to be represented to the Public as the Proprietor of the Paper, and to make and deliver an Affidavit to the same effect, to the Commissioners of Stamps (a). Afterwards *Bowden*, with *Richards's* privity, [*285] agreed to sell a Moiety of the Paper to the Defendant *Westmacott*; and, subsequently, he agreed to sell the other Moiety to him.

(a) The 33 Geo. 3, c. 78, enacts, That no person shall print or publish any Newspaper until an Affidavit or Affidavits made and signed as aftermentioned, shall be delivered to the Commissioners of Stamps, s. 1. That such Affidavit or Affidavits shall specify the real and true names, additions, descriptions, and places of abode of all persons who are intended to be the Printers and Publishers of the Newspaper, and of all the Proprietors of the same, if the number of such Proprietors, exclusive of the Printer and Publisher, does not exceed two: and in case the same shall exceed such number, then of two of such Proprietors, exclusive of the Printer and Publisher, and also the amount of the proportional shares of such Proprietors in the Property of the Newspaper, and likewise the true description of the building wherein such Paper is intended to be printed, and likewise the Title of such Paper, s. 2. That, where the number of such Proprietors exceeds two, the names of two Proprietors, the amount of each of whose proportional shares in the property of the Newspaper shall not be less than the proportional share of any other Proprietor, shall be specified in such Affidavit or Affidavits, s. 3. That an Affidavit or Affidavits of the like import shall be made, signed and given in like man-

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'*Richards* having taken the Benefit of the Insolvent Debtors' ['286] Act, the Bill in this Cause was filed by his Assignees, for the purpose of setting aside the Sales, on the ground that the first Sale was made fraudulently, and for an inadequate Consideration, and that the second was void, *Bowden* having no interest in the Paper, nor any authority from *Richards*, to enter into the Contract.

The principal ground of Defence was that *Richards* had suborned *Bowden* to commit Perjury, and, therefore, his Assignees were not entitled to the Relief asked.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Elderton*, for the Plaintiffs, said : First, that *Westmacott*, when he dealt with *Bowden*, knew that *Richards* was the Proprietor of the Paper and that *Bowden's* Affidavit was false, and, therefore, he was a Party to the Crime, and could not take advantage of it: Secondly, that *Bowden's* Name was used as a Trustee for *Richards*; that the Public had nothing to do with the beneficial Ownership of a Newspaper, as they were only concerned in having a Person who might be amenable to the Law for any slanderous or libellous Matter that might appear in the Publication.

ner, as often as any of the Printers, Publishers or Proprietors shall be changed, or shall change their place of abode or their Printing House, Place or Office, and as often as the Title of the Paper shall be changed, s. 4. That if any person shall knowingly and wilfully print or publish, or sell or deliver out any Newspaper, such Affidavit or Affidavits not having been duly signed, sworn and delivered, such person shall forfeit 100l., s. 7. That if any person making the Affidavit or Affidavits required by the Act, shall knowingly and wilfully insert therein the name or names, addition or additions, place or places of Abode of any person as Proprietor, Printer or Publisher of any Newspaper, who is not a Proprietor, Printer or Publisher thereof, or shall omit to mention therein the name or names, addition or additions and place or places of Abode of any of the Proprietors, Printers or Publishers thereof, contrary to the true meaning of the Act, such person shall be liable to the Pains and Penalties for wilful and corrupt Perjury, s. 8. That the Printer and Publisher shall deliver to the Commissioners of Stamps, to be kept by them, a Copy of every Newspaper printed or published by him, signed by him, with his name and place of abode, under a penalty of 100l.; and such Newspaper shall, on application made by any person for that purpose, to the Commissioners, be produced in Evidence in any Proceeding civil or criminal, s. 17. That no person other than a Commissioner or other Officer of the Stamp-office, shall supply any person with paper stamped for printing Newspapers, until the persons supplying shall have given Security to deliver to the Commissioners an Account of the stamped Paper supplied, and to whom by name: and that he will not supply the same to any Printer, Publisher or Proprietor, not having a Certificate signed by such Commissioners or Officer, purporting that the Security required by Law has been given by the Printer or Proprietor of the Newspaper, s. 26. That every person concerned in the printing or publishing of Newspapers not duly stamped, shall be a Debtor to his Majesty for the sum which would have accrued if the same had been so stamped, s. 27. That if any person shall file a Bill for the discovery of any persons concerned in the Property of, or as Printers, Editors or Publishers of any Newspaper, in order to enable him or them more effectually to bring or carry on any Suit or Action for Damages sustained by reason of any slanderous or libellous matter contained in such Newspaper, the Defendants shall not plead or demur to the bill, but shall make the Discovery, s. 28.

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[*287] **[The Vice-Chancellor:—By what act or proceeding did Bowden become a Trustee for Richards? How did the property in the Newspaper pass from Richards to Bowden? Copyright cannot pass without an assignment by Deed.]*

This is a question of a Share in a Trade, and not of Copyright.

[The Vice-Chancellor:—You ask, by your Bill, that the Defendant may be declared a Trustee of the Copyright of the Newspaper.]

That is an inaccurate expression. The Property in the Paper passed, from *Richards*, to *Bowden*, by a verbal arrangement. The Provisions of the Act of Parliament were made for the benefit of the Revenue merely. It is not against Public Policy to hold that a Person, whose name does not appear at the Stamp-office, is interested in a Newspaper. If there are more than two Proprietors, the second Section requires the Names of two of them only to be specified in the Affidavit. The 28th Section, which compels Defendants to Bills of Discovery filed by Persons suing for Damages, to disclose the Names of all the Persons connected with the Newspaper, shows, beyond all doubt, that no question of Public Policy is involved, and that all the other provisions of the Act are mere fiscal regulations.

Richards was no party to the second Sale: that was a case of mere Fraud.

The *Attorney-general*, Mr. *Pepys* and Mr. *Bacon*, for the Defendant:

[*288] It is a principle of great importance in the *administration of Justice, to discourage Perjury and Subornation of Perjury. The Contract was a Contract between *Bowden* and *Westmacott*. *Richards* was present. He never told *Bowden* not to sell, or *Westmacott* not to buy; but he entered into an agreement with *Westmacott*, to supply certain articles for the Paper, for which *Westmacott* was to pay him three guineas a week. The Bill states that *Richards* was the Proprietor of the Paper; not a word is said about *Bowden* being a Trustee for him. The Provisions of the Act are not mere fiscal regulations. The object of the second Section is that the Public may know who are the Persons who have the greatest interest in the Paper. The 28th Section gives the Public a still greater benefit, by extending the remedy against all the Persons in any way connected with the Paper. If the requisites of the Act were not complied with, there is an end of the Plaintiff's Case.

Bowden committed Perjury at *Richard's* instance. *Richards* took his own Affidavit off the files of the Stamp-office, to enable *Bowden* to put his Affidavit on the files. *Richards*, therefore, was guilty of Subornation or Perjury; and this Court will not grant to his Assignees the relief they ask. *Bensley v. Bignold*(b); *Marchant v. Evans*(c); *Stephens v. Robinson*(d).

(b) 8 Taunt. 142.

(c) 5 Barn. & Ald. 335.

(d) 2 Crompt. & Jervis, 209.

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Sir *E. Sugden*, in reply :

The Defendant's Counsel have endeavoured to construe the Act as if it deprived the Proprietor of his Property in the Newspaper. The Act does not destroy the Title of the Proprietor because his Name does not appear at the Stamp-office. No Act of Parliament can take [*289] away a Man's Property, except by express words. The Cases cited show that, if the Printer or Proprietor of a Newspaper omit to do some thing required by the Act, he cannot recover from a third Person; but there is no Case that decides that he cannot maintain his Title to the Newspaper itself. Penalties are imposed for omitting to do what the Act requires. The Act, therefore, provides its own Remedies, and this Court has no right to go beyond those Provisions. The concealment of the Proprietor's Name, cannot operate to any extent, as the Bill of Discovery will prevent it.

In many cases, the Assignees may recover Property which a Bankrupt or an Insolvent cannot. Thus, in cases of fraudulent preference, the Assignees may call back the Property, though the Bankrupt himself cannot.

The VICE-CHANCELLOR, after observing on the Evidence in the Cause, and on the mode in which Property in a Newspaper might be acquired, proceeded thus :

The Policy of the Law having made it necessary that certain Acts should be done by the Printers and Publishers of Newspapers, the Act of the 38 Geo. 3, c. 78, was passed, which recites that it is expedient that Regulations should be provided touching Publications of the nature after-mentioned; and then it enacts, &c. [His Honor here read the Sections of the Act which had been referred to in the course of the Argument.] My Opinion is that these are not mere Fiscal Regulations, but that the object of the Legislature was to make it certain who the Persons are who publish matter *that affects either the character of private individuals, or the security of the Government. [*290]

In this Case, at the time when *Westmacott* purchased, there were not two Persons interested in the Newspaper. Either *Bowden* or *Richards* was solely interested in it. If *Bowden* was a Trustee for *Richards*, there would have been but two Persons interested, and both their Names ought to have appeared in the Affidavit. That *Richards* was privy to *Bowden's* Acts, is indisputable. It is, plain, therefore, that they conspired together to do that which the Policy of the Law forbade; for they agreed to represent that *Bowden* was the sole Proprietor of the Paper: and that puts an end to the whole of the Plaintiff's Case; for no relief can be given, in a Court of Justice, to those who show that they thought proper to disappoint the Policy of the Law, and to do that which the Policy of the Law requires should not be done.

Bill dismissed with Costs

1833.—Dobree v. Schroder.

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DOBREE v. SCHRODER.

1833: 25th & 31st July, and 1st August.—*Ship.—Construction of 53 G. 3. c. 159.*

By the 53 G. 3. c. 159, the responsibility of Shipowners for damage done by their Ships to other Vessels, is limited to the value of the Ship doing the damage: held, that such Value must be ascertained as at the time of the accident.

ON the 3d of November 1831, a ship called "The *Julie*," belonging to the Defendant *Schroder*, was run down and sunk by "The *Lord of the Isles*," a vessel belonging to the Plaintiffs. In Michaelmas Term 1832, the Defendant, *Schroder*, brought an Action against the Plaintiffs for 2,219*l.* 13*s.* 3*d.*, being 1,577*l.* 3*s.* 6*d.* for the value of The *Julie*, and of her Tackle, Apparel and Furniture; 596*l.* 18*s.* 11*d.* for the amount of her Freight, and 45*l.* 10*d.* for the value of her Stores and Provisions; and in February 1833 he obtained a Verdict for 2,200*l.* The Defendants, *Fruhling* and *Goschen*, who were the owners of the Cargo on board The *Julie* at the time of the Accident, also brought an Action, for the value of the Cargo, against the Plaintiffs, and recovered a Verdict for 8,568*l.*

In April 1833, the Bill in this Cause was filed under the 53d Geo. 3. c. 159,* (by which the responsibility of Shipowners for any Damage done, without their fault, to any other Vessel or her Cargo, is limited to the value of their Ship and the Freight for the Voyage in prosecution at the time of the accident) stating that the value of The *Lord of the Isles* did not exceed 6,100*l.*, and that her Freight for the Voyage which was in prosecution at the happening of the damage, did not exceed 60*l.*, and praying that it might be declared that the Defendants, *Schroder*, *Fruhling* and *Goschen*, were not entitled to recover, in respect of the Damage sustained [*292] by them, more than the value of The *Lord of the Isles*, her Appurtenances and Freight; that such value might be ascertained and distributed amongst the Defendants, according to their rights, or that the Vessel might be sold, and the proceeds, together with the value of the Freight, be distributed as aforesaid; and for an Injunction to restrain further proceedings in the Actions. On the 22d of April 1833, the Court granted the Injunction, and ordered the Plaintiffs to pay the 2,200*l.* and 60*l.* into Court, and referred it to the *Master* to approve of a proper Security for payment, by the Plaintiffs, pursuant to such Order as the Court should thereafter make, of such Sum as should be found to be the value of The *Lord of the Isles*, her Appurtenances and Freight, according to the provisions of the Act of Parliament, deducting the 2,200*l.* and 60*l.* from the amount of such Value.

* See Sects. 1, 7, 8, 10.

1833.—Dobree v. Schroder.

The Defendants now moved for liberty to issue Execution, in their several Actions, for their Costs of such Actions; and that the 2,260*l.* might be paid out to the Defendant *Goschen*, and that the Plaintiffs might be ordered to pay to him 3,900*l.* (which was the difference between the 2,250*l.* and the 6,160*l.* the admitted value of The *Lord of the Isles* and her Freight, at the time of the accident; or that it might be referred to the Master to inquire and state what was the value of The *Lord of the Isles*, her Appurtenances and Freight, on the 3d of November 1831, that being the day on which the Damage was done.

The Motion was supported by an Affidavit of the Defendant *Goschen*, stating that, at the time of the accident, The *Lord of the Isles* was nearly a new Ship, and was worth 11,000*l.* at the least, and that the Plaintiffs had insured her for 12,000*l.*; that since November [*293] 1831, she had been employed in carrying Troops and Stores to Oporto, and, by the wear and tear of such employment, she had been reduced in value.

Mr. *Pepys* and Mr. *Teed*, in support of the Motion, said that the Plaintiffs were protected, by the Act, from paying more than the value of their Ship and her Freight, but that they were not protected from the payment of the Costs of the Actions; that the time to be looked at in ascertaining the value of the Ship, was the time when the damage was done; *Wilson v. Dickson* (a); *Cannan v. Meaburn* (b); that, with respect to the Freight, the Legislature did look to a future time, because it was to be earned.

Mr. *Knight* and Mr. *James Russell*, for the Plaintiffs:

The Court has no authority but what the Act gives it. The 7th Section requires that the Plaintiffs, in their Affidavit to be annexed to the Bill, shall state that the Value of their Ship does not exceed a certain Sum; and, in all the other Sections, the language is strictly present. In one instance, the words "at the time of the accident" are expressed. Why should it be inferred that that time was meant, when it is not expressed? What is to prevent the Parties who have suffered the Damage, from making their claim at the time of the accident? If they lie by, they cannot complain of any deterioration which has taken place, in the Value of the Ship, in the meantime. They suffered more than 12 months to elapse before they brought their Actions; and the delay is unaccounted for. With [*294] respect to the Cases that have been cited, it is enough to say that the question now before the Court, which depends on the 7th and 8th Sections of the Act, was not then raised. If the reference is to be as to the Value of the Ship at the time of the accident, there can be nothing paid either into or out of Court.

The next point is with respect to the course of Proceeding. The De-

(a) 2 Barn. & Ald. 2.

(b) 1 Bing. 465.

 1833.—Swindell v. Swindell.

fendants are Persons of whom we know nothing, except what they state before Answer. When the Answers are put in, it may, perhaps, appear that there are other Persons, besides the Parties who have brought the Actions, who are entitled to participate in the Value of the Ship. When a Fund is to be distributed amongst a class of Persons, the Court always directs an Inquiry to ascertain who are the Persons constituting that class. The 8th Section directs the Court, in case the Bill shall be dismissed after any Money shall have been paid into Court, to order the Money so paid in, to be paid to the Defendants. But the 10th Section authorizes the Court to distribute the Value of the Ship amongst the several Persons entitled thereto; therefore, it is premature to ask for anything, except to have the 3,900*l.* paid into Court.

The VICE-CHANCELLOR :

Upon the question of Costs, I entirely agree with the Defendant's Counsel. By the Act a benefit is given, to the Owners of Vessels doing damage to other Vessels, which avoids a multiplicity of Suits, and they have that benefit by proceedings in Equity; I think, therefore, that the Defendants have a right to their Costs at Law.

[*295] *With respect to the questions as to the time at which the value of the Ship is to be taken, and to whom it is to be paid, I cannot but think that, in *Wilson v. Dickson*, the question as to the Value was not brought to the attention of the Court; but I am satisfied, on the construction of the Act, that the Value of the Ship is to be the Value at the time of the accident; and that the Legislature meant to provide for those Claimants who do, in fact, bring Actions. I shall, therefore, make an Order according to the Notice of Motion, except that the 3,900*l.* must first be paid in, and then paid out of Court.

SWINDELL v. SWINDELL.

1833: 1st August.—*Practice.—Process.*

The Defendant had been taken under an Attachment for want of Answer, but, on his paying the Sheriff 40*l.* to be repaid on putting in his Answer, the Sheriff at the request of the Plaintiff's Agent, discharged him. Motion for a Messenger to take the Defendant who had not put in his Answer, refused.

THE Sheriff had taken the Defendant under an Attachment for want of Answer; but, at the request of the Plaintiff's Agent, had discharged him out of Custody, on his paying the Sheriff 40*l.*, which was to be returned on the Answer being filed.

1833.—Williams v. Townshend.

The Answer not having been put in, Mr. *Coleridge* now moved for a Messenger to take the Defendant.

The *Vice-Chancellor*, after consulting the Registrar, refused the Motion, saying that, if a Defendant is in the Sheriff's custody, a *Habeas Corpus* goes; if Bail has been taken, then a Messenger is ordered to bring up the Defendant; but, in this case, the Defendant was neither in Custody nor out on Bail.

*LAWRENCE v. HALLIDAY.

[*296]

1833: 2d August.—Opening—Biddings.

Biddings opened on an advance of 300*l.* on 5,030*l.*

MOTION to open Biddings on an advance of 300*l.* on 5,030*l.*

Mr. *Knight* and Mr. *Hayter* for the Motion.

Mr. *Rolfe* and Mr. *Stinton contra* cited *Garstone v. Edwards*. (a)

The *Vice-Chancellor* made the Order.

WILLIAMS v. TOWNSHEND.

1833: 3d August.—Practice.—Subpœna.—Attachment.

A Defendant, who had been taken on an Attachment for want of appearance, was discharged, under 11 Geo. 4, and 1 Will. 4, c. 36, before Plaintiff got an Appearance entered for her. Held that, though a fresh *subpœna* might be issued against the Defendant, no Attachment could be taken out upon it.

THE Defendant, *Mary Harrison*, had been taken on an Attachment for want of appearance; but, before the Plaintiff took Proceedings to get an Appearance entered for her, with a view to the Bill being taken *pro confesso*, she was discharged from the Attachment under 11 Geo. 4, and 1 Will. 4, c. 36.

Mr. *Spence*, for the Plaintiff, then moved for liberty to issue a fresh *subpœna* against the Defendant. But The *Vice-Chancellor*, doubting whether, if a fresh *subpœna* were issued, an Attachment [*297] could be taken out upon it, desired a Certificate to be obtained, from the Clerks in Court, upon the point.

The Certificate was as follows: "The Clerks in Court are of opinion that, although a new *subpœna* may be issued, yet, as the former Attachment was regularly enforced, a new Attachment cannot be issued: and, as the Defen-

 1833.—Martin v. Wright.

dant has not appeared to the Bill, it may be dismissed against that Defendant, without Costs, and a supplemental Bill in the nature of an original Bill, filed against her."

Mr. *Spence*, accordingly, now moved to dismiss the Bill; which was ordered.

MARTIN v. WRIGHT.

1833 : 9th August.—*Prints and Engravings*.—*Copyright*.

A. made a Copy of a Print invented by B., in colours, and of larger dimensions, and exhibited it as a Diorama. The Court refused to restrain the Exhibition, until the Right had been established at law.

In 1821, the Plaintiff, a celebrated Artist, invented and painted from Sketches which he had designed, a Picture called *Belshazzar's Feast*; which he shortly afterwards sold. In 1826, he engraved and published, from the Sketches, a Print of the same name, having previously done all necessary acts for securing to himself the Copyright of the Print (a). The Defendant, having purchased one of the Prints, had it copied on Canvass, in Colours, on a very large scale, and with Dioramic effect; and, he publicly exhibited such Dioramic Copy at the *Queen's Bazaar* in [*298] *Oxford-street*, for Money, and described it, "in his Handbills and Advertisements, as "Mr. *Martin's* Grand Picture of *Belshazzar's Feast*, painted with Dioramic effect." The sale of the Plaintiff's Print having been injured, as he alleged, by the Exhibition, the Bill was filed, stating as above, and praying that the Defendant might be restrained from further exhibiting the Dioramic Copy, and from representing to the Public that it was the production of the Plaintiff; and that the Defendant might account for and pay to the Plaintiff the Profits he had made by the Exhibition.

Mr. *Knight* and Mr. *Chandless*, in support of the Motion, relied, principally, on the 17 Geo. 3, c. 57, by which all Persons who, in any manner, Copy any Print, in the whole or in part, by varying or adding to the main Design, are subjected to an Action for Damages. They said that there was no difference between selling a Copy of a Print, and exhibiting it for money; as, in both cases, Profit was made of that which was appropriated to another.

(a) See *ante*, Vol. V. page 399, note (c), where the Acts of Parliament by which the Property in Prints is secured to the Inventors, are collected.

1833.—Ullock v. Barber.

Mr. *Pepys* and Mr. *Keene* appeared for the Defendant, but

The VICE CHANCELLOR, without hearing them, said: Any person may copy and publish the whole of a Literary Composition, provided he writes Notes upon it, so as to present it to the Public, connected with matter of his own. Here the Defendant is alleged to have made a Copy of the Plaintiff's Print, in Oil Colours and of dimensions different from the Plaintiff's Print, not to sell, but to exhibit, in a fixed place, and in a given manner, so as to produce an Optical illusion. Exhibiting for Profit is, in no way, analogous to selling a Copy of the Plaintiff's Print, but is dealing with it in a very different manner.

*The 8 Geo. 2, c. 13, directed, in general terms, that any Per- [*299] son who should invent and engrave any Historical or other Print or Prints, should have the sole Right and Liberty of printing and re-printing the same for the term of 14 years, and protected that Right by Penalties. The 7 Geo. 3, c. 38, extended the protection of the former Act, no otherwise than to things not before enumerated, and for the term of 28 years. The 17 Geo. 3, c. 57, gave a Remedy by Action on the Case, which had not been given by the former Acts.

It appears to me that that Act never was intended to apply to a Case where there was no intention to print, sell or publish, but to exhibit in a certain manner; and, therefore, I ought not to grant the Injunction until the Right has been established at Law.

Then, with respect to the Defendant representing his Copy, as *Martin's* Picture. It must be either better or worse: if it is better, *Martin* has the benefit of it; if worse, then the misrepresentation is only a sort of Libel, and this Court will not prevent the publication of a Libel.

If *Martin* had exhibited his Picture as a Diorama, then he might have been entitled to an Injunction (*b*).

*ULLOCK v. BARBER.

[*300]

1833: 8th & 9th August.—Debtor and Creditor.—Bankrupt.

C. brought an Action against F. in the Lord Mayor's Court, for the recovery of a Debt, and issued an Attachment against B., who had in his hands Funds belonging to F. W. filed a Bill against C. B. and F., claiming a Lien on the Funds, and obtained an Injunction *ex parte* to restrain proceedings in the Action. Whilst the Injunction was in force, F. became Bankrupt—held that though C. might, but for the Injunction, have sued out Execution long before F. became Bankrupt, yet he was not entitled to be paid otherwise than rateably with the other Creditors.

R. J. FAYRE, the Captain of an *East India* Ship, being indebted to the

(b) See *Page v. Townsend*, ante, Vol. V. p. 395.

1833.—Ullock v. Barber.

Plaintiffs, on account of the proceeds of some Wines which he had sold in *India* on their account, and being about to sail again for *India*, was requested by the Plaintiffs to direct his Agents, *Barber, Neate & Co.*, of *Clement's-lane, London*, to pay over to the Plaintiffs all Remittances that might be made to them on account of the Wines. Accordingly, *Fayrer*, on the 27th of July 1829, sent a Letter to *Barber, Neate & Co.*, desiring them to pay over, to the Plaintiffs, the amount of the Proceeds of the Wines, out of any Remittances which should be received by them, from *M. Petrie*, his Agent in *India*. On the receipt of this Letter, *Barber, Neate & Co.* informed the Plaintiffs that they had not then received any Remittances from *Petrie*; but they undertook and agreed, (as it was alleged,) to pay, to the Plaintiffs, the Sum due to them, out of such Remittances when received. In 1830, *Petrie* remitted to *Barber, Neate & Co.* 1,500*l.* on the Plaintiff's account.

Fayrer being indebted, on Bond, to *A. Colvin*, in 1,500*l.*, and *Colvin* having learnt that *Barber, Neate & Co.* had in their hands the 1,500*l.* belonging to *Fayrer*, in November 1830 brought an Action against [*301] *Fayrer* in the Lord Mayor's Court, and issued a Foreign Attachment against *Barber, Neate & Co.*, in respect of the Money in their hands belonging to *Fayrer*. The Action was set down for Trial on the 31st of May 1831.

On the 28th of that month the Bill was filed, praying that the Plaintiffs might be paid what was due to them from *Fayrer*, out of the 2,500*l.* remitted to *Barber Neate & Co.*; and that the latter might be restrained from parting with the 1,500*l.*, *except under the Order and Decree of the Court*, and that *Colvin* might be restrained from proceeding upon the Attachment, and from, in any manner, prosecuting the Action. On the same day the Injunction was obtained *ex parte*, and *Colvin* having been served with Notice of it, the Trial of the Action was stayed. The 1,500*l.* was afterwards brought into Court. On the 17th of November 1831, and whilst the Injunction remained in force, a Commission issued against *Fayrer*, under which he was declared a Bankrupt. A Supplemental Bill was then filed against his Assignees. It was afterwards agreed, with a view to putting an end to the Suit, that a Motion should be made for an Order that the Costs of all parties should be taxed and paid out of the Fund in Court, that, out of the Balance, the Plaintiffs should receive 102*l.* being one-third of their Debt, in satisfaction of the whole; and that the remainder of the Fund should be paid to the Assignees, and that the merits of *Colvin's* Claim should be discussed on the hearing of the Motion.

Mr. Knight, Mr. Turner, Mr. G. Richards, Mr. Goodeve and Mr. Hughes, in support of the Motion.

[*302] Mr. Agar and Mr. Teed for *Colvin*, referred to the *108th sec-

1833.—Ullock v. Barber.

tion of the Bankrupt Act (6 Geo. 4, c. 16) (a), and said that the Injunction had been irregularly granted; that but for the Injunction, *Colvin* would have obtained Judgment and issued Execution in his Action, long before November 1831; that the Court would take care that he was not placed in a worse situation than he would have been in, if the Injunction had not been granted; *Pulteney v. Warren* (b), *O'Donel v. Browne* (c); and that, the Money having been paid into Court, for the purpose of being disposed of under the Order and Decree of the Court, the Court would distribute it according to the justice of the case.

Mr. Knight in reply:

In *Pulteney v. Warren*, there were two Parties only; the one who had been damnified, and the other who had interfered and caused the injury. Here the Money is claimed by the Assignees, and, in such a case, the Court will not institute an Inquiry into the conduct of third Parties, although the Injunction may have been irregularly obtained.

*Execution is stayed by an Order for a new Trial; and yet [*303] no Equity is raised if the Defendant becomes Bankrupt before the new Trial takes place. An Attachment in the Lord Mayor's Court, is merely an interlocutory proceeding to compel a Defendant to put in Bail, or to enter an Appearance. At any period before Execution levied, the Defendant may remove the Proceedings into a Superior Court; and then the Process in the Lord Mayor's Court is discharged (d).

The VICE-CHANCELLOR:

This Case was argued, with great ingenuity, by the Counsel for the Defendant *Colvin*; but I cannot accede to the view which they take of it.

The 108th Section of the Bankrupt Act declares, imperatively, what the Law is. [His Honor here read the Section.] Now, *prima facie*, the Bankrupt Laws are to be taken in such a manner as to conduce to the benefit of the Creditors in general. There can be no doubt on the words of this Section: the Proviso at the end of it, has the effect of defeating the right of a fair Creditor for valuable consideration, in a Case in which the Bankrupt, by his own act, may have prevented the Creditor from pursuing a course which he would otherwise have taken. So also a Legal proceeding

(a) That Section enacts, "That no Creditor having Security, for his Debt, or having made any Attachment in London or any other place, by virtue of any custom there used, of the Goods and Chattels of the Bankrupt, shall receive, upon any such Security or Attachment, more than a rateable part of such Debt, except in respect of any Execution or Extent served and levied by seizure upon, or any Mortgage of or Lien upon any part of the Property of such Bankrupt before the Bankruptcy; provided that no Creditor though for a valuable consideration, who shall sue out Execution upon any Judgment obtained by default, confession or *nil dicit*, shall avail himself of such Execution to the prejudice of other fair Creditors, but shall be paid rateably with such Creditors."

(b) 6 Ves. 73. see 90.

(c) 1 Ball & Beatt. 262.

(d) See *Holt v. Murray*, ante, Vol. I, page 485; and *Wetter v. Rucker*, 1 Brod. & Bing. 491.

1833.—*Lewes v. Lewes.*

may prevent a Creditor from suing out Execution so promptly as he might have done ; for a Court of Law might be induced, on a frivolous case, to stay Execution by granting a Rule *Nisi* for a new Trial ; yet, if [*304] the Debtor were to become Bankrupt before Execution taken out, a Case would be raised to which this Section would apply.

My opinion is that, if the Creditor is, in any manner, prevented from getting Execution until the Debtor becomes bankrupt, he is not entitled to be paid otherwise than rateably with the other Creditors. This Fund, therefore, belongs to the Assignees ; and, if they choose that it should be paid in a particular manner, I do not see any reason why it should not be so paid.

Motion granted.

LEWES v. LEWES.

1833 : 11th November.—*Alienation.—Forfeiture.—Will.*

Testator devised his Estates to Trustees, in Trust to pay, out of the Rents, 300*l.* a year for the maintenance of his Son's Children, and to pay the Surplus Rents to his Son during his Life, for the maintenance of himself and his Family ; but so as he should not have any power to charge or alienate the same : provided that if his Son should, in any manner, impede or frustrate the Trusts of the Will, then the Surplus Rents should be no longer paid to him, but should be accumulated by the Trustees, for the benefit of the Son's Children. The Son conveyed his interest under the Will to Trustees for his Creditors : Held that, thereupon, the Trust for accumulation, took effect.

WILLIAM LEWES, Esq., by his Will, dated the 6th of May 1826, gave his capital Messuage, Lands and other Hereditaments in the Counties of *Carmarthen* and *Cardigan*, unto and to the Use of Trustees and their Heirs, during the life of his eldest Son, the Defendant *William Lewes*, [*305] upon Trust from time to time during the Life of his said Son, to receive the Rents of the Premises, and in the first place to pay thereout the yearly Sum of 300*l.* for the Maintenance, Clothing, and Education of all the Children of his said Son, in equal Shares, during his Life, and to pay the Residue of such Rents, after allowing for Repairs and Taxes, and deducting the Costs and Charges of receiving the same, unto his said Son, for his Use, and for the personal Support and Maintenance of himself and Family, from year to year during his Life, but so as he should not have any power, by any ways or means whatsoever, to mortgage, charge or alienate the same Residue of such Rents, or any part thereof, by anticipation ; it being the Testator's meaning that the same should not be subject or liable to the Control, Debts or Engagements of his said Son, nor be liable to be seized or taken by or for the use of any Creditor or Creditors of his, by virtue of any Extent or Sequestration, or any Process or Adjudication whatsoever of any Court of Law or Equity : and, as to the said devised Premises, from and

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immediately after the Decease of his said Son *William*, to the use of his, the Testator's Grandson, the Plaintiff *William Lewes*, and the Heirs of his body, and, in default of such Issue, to the use of the Testator's Grandson, the Plaintiff *John Lewes*, and the Heirs of his body, and, in default of such issue, to the use of the Testator's own right Heirs. And the Testator empowered his Trustees to employ Bailiffs or Agents, during his Son's Life, to assist in the management of the Estates: Provided always, and it was his will, and he thereby expressly ordered and directed that, if his Son, *William Lewes* should refuse to ratify and confirm his Will, when thereunto required, *or should at any time, in any manner whatsoever, impede or frustrate the Trusts thereof, or interfere therewith, or with the receipt of the Rents of the Testator's Estates* *thereinbefore directed [*306] to be paid to him in manner aforesaid, or if he should, at any time, cut down or cause to be cut down any Timber Trees upon the Estates, then, and in any such case, and immediately upon any such interference or conduct of his said Son, the Testator's Will was, and he thereby ordered and directed that the Residue of the Rents of his said Estates should be no longer paid to his said Son, but that his Claim to the same should be forfeited, and that the Trustees should, from thenceforth, for the term of 21 Years, to be computed from the Testator's decease, (if his said Son should so long live) lay out and invest the Residue of the Rents, after paying the said yearly Sum of 300*l.*, in their Names, in the usual Securities, and lay out the Interest and Dividends of such Securities in like manner, in order to accumulate, and should stand possessed of such Securities and the accumulations thereof, in Trust for the younger Children of his said Son *William Lewes*, to be paid to them, in equal shares, at the usual times; and, after the expiration of the term of 21 Years, in case his said Son *William Lewes* should be then living, upon Trust that the Trustees should, for the remainder of his said Son's Life, pay and apply the net Residue of the Rents, either unto or for the use and benefit of his said Son and his Family, independent of his Debts, Control or Engagements and in the manner thereinbefore mentioned, or should again lay out and invest such Residue at Interest, so as to accumulate for the benefit of his Children, as his Trustees should think proper: and the Testator thereby wished it to be known to his said Son that, in consequence of the Debts he had improvidently contracted, and which the Testator had already paid to a very considerable amount, the Limitations and Restrictions above mentioned had been made; and he thereby released his said Son from a Debt of 9,497*l.*

*The Testator died in March 1828.

[*307]

By Deeds of the 30th of April and 1st of May 1829, *William Lewes*, the Testator's Son, conveyed all his property, including his Interest under the Will, to *G. Pentland* and *O. Lloyd*, as Trustees for pay-

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ment of his Debts. In Trin. Term, 6th Geo. 4, *T. Quarrington* entered up Judgment against him, under a Warrant of Attorney dated the 5th August 1825, and, in Easter Term 1829, took out *Elegits*, directed to the Sheriffs of *Cardiganshire* and *Carmarthenshire*. In May 1830 *Lewes* was declared a Bankrupt.

The original Bill was filed to have the Trusts of the Will performed : and *Pentland*, *Lloyd*, *Quarrington* and *Lewes's* Assignees were brought before the Court by Supplemental Bills.

Sir *E. Sugden* and Mr. *G. Richards*, for the Plaintiffs, contended that, under the circumstances above-mentioned, *Lewes's* interest under the Will, had determined, and the Trust for accumulating the Rents, had taken effect. *Dommett v. Bedford* (a), *Shee v. Hale* (b), *Wilkinson v. Wilkinson* (c), *Cooper v. Wyatt* (d).

Mr. *Beames* and Mr. *Hindes*, for the Defendant *Quarrington*.

The words of the Will, by which the Testator intended to exempt the Provision made for his Son, from alienation and liability to his Debts, are inoperative. *Brandon v. Robinson* (e).

[*308] "The Warrant of Attorney was executed long before the Testator's death, and even before the date of his Will. A party cannot forfeit his interest by an act done antecedently to the vesting of that interest. The words of the Proviso clearly refer to some act to be done by *Lewes*. The issuing of the *Elegits* was an act done *in invitum*. *King v. Robinson* (f), *Goring v. Warner*, (g), *Doe v. Carter* (h).

Mr. *Pepys* and Mr. *Wakefield*, for the Defendant *Pentland* :

The *Elegits* were not sued out until after the 1st of May 1829 ; for Easter Term in that year, did not commence until after the 1st of May.

The Testator, in his Will, deals with his Son in the character of Heir, and not as Devisee. He says that, if his Son shall refuse to ratify and confirm his Will, or shall impede or frustrate the Trusts thereof, then the Rents shall be no longer paid to him. The Testator, therefore, had in view the destruction of the Trusts, and not a modification of them. Three causes of Forfeiture are mentioned ; but none of them has any reference to anything the Son might do with the Provision made for him. If he dealt with that Provision as this Court would hold him entitled to do, he was not to forfeit it. The forfeiture was to be caused by interfering with the

[*309] Trusts, and not by dealing with the Provision. "Consequently *Pentland* and *Lloyd* are now in a situation to claim the benefit of their Deeds.

(p) 6 T. R. 684.

(b) 13 Ves. 404.

(c) 3 Swan. 515.

(d) 5 Madd. 482.

(e) 1 Rosc. 197 ; 18 Ves. 429.

(f) *Wightw.* 386. See also *Graves v. Dolphin*, ante, Vol. I. page 66 ; and *Green v. Spicer*, 1 Russ. & Myl. 395.

(g) 2 Eq. Ab. 100.

(h) 8 T. R. 57.

1833.—*Lewes v. Lewes*.

Mr. *Knight*, Mr. *Duckworth* and Mr. *Wigram*, for the Defendants, the Assignees under *Lewes's* Bankruptcy, contended that the Deed of the 1st of May 1829, was void as being an act of Bankruptcy: that a distinction had been frequently taken between an active and a passive Alienation; and Bankruptcy had been held not to come within words prohibiting an active Alienation: *Lear v. Leggett* (i): that the object of the Proviso was to prevent *Lewes* from disputing or impeaching the Will, and to secure the existence of the Trusts.

Mr. *Barber* appeared for the Defendant *Lloyd*, who did not execute the Deed of the 1st of May 1829, and Mr. *Hall*, Mr. *Pitman* and Mr. *Shapter*, for the Executors of the Testator, and other formal Parties.

The VICE-CHANCELLOR:

I do not want a Reply.

My opinion is that the Deed of the 1st of May 1829, is expressly within the terms of the Testator's Will, and that thereby a Forfeiture has been incurred, or rather that, on the execution of that Deed, the Trusts for the accumulation of the Rents commenced. It will not, therefore, be necessary for me to advert to the claims made by the Judgment Creditor and the Assignees under the Commission, for, on the execution of that deed, *Lewes's* interest wholly determined.

"It is clear that though the Testator, in the first part of his [* 310] Will, may have used terms which, in the contemplation of a Court of Justice, might only amount to a Gift, yet he might very well have thought that those terms did create a Trust. It is perfectly manifest that what he meant, was that, after paying the 300*l.* a year, the Surplus of the Rents should be payments made by the Trustees, to be applied to the maintenance of the Son and his Family: and, afterwards, he has used terms which show it was his intention that the Son should not, by anticipation or otherwise, prevent that application of the Rents. It is not enough to say that, in the first instance, there has been a mere Gift made, and, therefore, no trust created; but the whole of the Will must be taken together; and if I find, in a subsequent part of the Will where the Proviso for accumulating the Rents is contained, that the Testator does designate that form of Gift by the word 'Trust,' then I have only to consider whether the act done has interfered with the manifest intention of the Testator. He provides that, if his Son should refuse to ratify and confirm his Will when thereunto required, "or shall at any time in any manner whatever, impede or frustrate the Trusts thereof or interfere therewith, or with the receipt of the Rents, Issues and Profits of the Estates," then the surplus Rents shall be no longer paid to his Son, but his claim to the same shall be forfeited. It is, I think, perfectly plain that, if this Deed of the 1st of May 1829 were allowed to operate,

(i) *Ante*, Vol. II. page 479. Affirmed on Appeal. See 1 Russ. & Myl. 690.

1833.—Cocker v. Lord Egmont.

on the first part of the Will, merely, and be said to be a mere dealing by the Son with that which was given to him absolutely, it would contradict the intention of the Testator.

[*311] "My opinion is that this Deed of the 1st of May 1829, was an instrument which, if allowed to operate, would have "impeded and frustrated" the Trusts of the Testator's Will, (that is to say,) his intention expressly before declared.

Declare the Will to be established, and that the Trusts ought to be carried into execution; and that, under the circumstances in the Pleadings mentioned, the Residue of the Rents, after paying the 300*l.* a year, are to be accumulated, as directed by the Will*

COCKER v. LORD EGMONT.

1833: 9th November.—*Debtor and Creditor.—Pleading.—Parties.*

A Debtor conveyed certain of his Estates to Trustees, in Trust to raise a Fund for payment of his Creditors named in a Schedule, and to raise an annual Sum for his own benefit. Several of the Creditors executed the Conveyance; but the Trustees did not sell the Estates, the Creditors having received Sums in or towards satisfaction of their Debts, out of other Estates conveyed by the Debtor upon the same Trusts. A Judgment Creditor, whose name was not mentioned in the Schedule, filed his Bill against the Trustees of the first-mentioned Estates and the Debtor, stating as above, and that the Trustees had entered into the Receipt of the Rents of those Estates, the value of which greatly exceeded the scheduled Debts, and praying that his Debt might be raised and paid out of such parts of those Estates as should not be sold for payment of the scheduled Debts, and that an Account might be taken of the Receipts and Payments of the Trustees, and for a Receiver, and an Injunction to restrain the Trustees from paying any part of the Rents or Produce of the Estates to the Debtor. The Trustees demurred, because the scheduled Creditors who had executed the Conveyance, were not Parties to the Bill. Demurrer allowed.

THE Bill, stated that, on the 12th of June 1820, the Earl of Egmont and two other Persons, executed a joint and several Bond to the Plaintiff, for securing the payment of 3,000*l.*, within six months after the [*312] Death of the Earl's Father, (who died in 1822,) with "Interest in the meantime: that, by Lease and Release of the 1st and 2d of November 1824†, made between, the Earl of the first part, certain of his Creditors whose Names were set down in the Schedules to the Release, of the second and third parts, Viscount Perceval of the fourth part, and E. Tierney and others (Trustees) of the fifth part, the Earl conveyed certain Estates in *Somersetshire* to the Trustees, in Trust, by Mortgage, Sale and Receipt of the Rents, and by the sale of Timber on the Estates, to raise a Fund for payment of his Debts: that the Release contained a Declaration

*Affirmed by Lord Lyndhurst, C. 21 January 1835.

† See *Newton v. Lord Egmont*, ante, Vol. IV. p. 574; and Vol. V. p. 130, where the Release is more fully set forth.

1833.—Cocker v. Lord Egmont.

that such parts of the Estates as should not be disposed of for raising the Fund, and also the Residue of the Fund after Payment of the Debts, should be held and applied upon certain Trusts, in the Release mentioned, for the use or benefit of Lord *Egmont*, or according to his disposition; or to some such or the like effect; and that, by the Release, some annual or other sum was directed to be raised, out of the Estates or the Rents, Profits or Produce thereof, for his benefit: that, as the Plaintiff had not been permitted to see the Release, or to have a copy thereof, he was unable to set forth, more particularly, the contents thereof; but the Defendants ought to set forth such contents, and, especially, the Trusts relating to the application of such parts of the Estates and the Rents and Produce thereof as should not be sold for the purpose of forming the Fund before-mentioned, and also the Trusts relating to the application of the Residue of the Fund, after payment of the Debts, and to any annual or other Sum directed to be raised out of the Estates, or the Rents, Profits or *Produce there- [*313] of, for Lord *Egmont's* use or benefit: that several of the Creditors named in the Schedules had executed the Release: that the Trustees had entered into and still were in the possession or receipt of the Rents of the Estates, but had not sold any part thereof, though they had sold Timber thereon: that the value of the Estates greatly exceeded the amount of the Debts chargeable thereon under the Release, and the Income thereof was more than sufficient to keep down the Interest of the Debts: that it would not be necessary to sell the whole of the Estates for the purpose of forming the Fund beforementioned, or, if all the Estates should be sold, there would be a larger surplus of the Fund after payment of the Debts, as would appear if the Defendants would disclose the value of the Estates, the amount of the Rents, and of the Debts mentioned in the Schedules: that Lord *Egmont* had executed some other Deeds whereby he conveyed his Estates in *Ireland*, to Trustees for the benefit of his Creditors, subject, however, to the payment to himself, in the first instance, of a large Annuity during his Life: that the whole or greater part of the last-mentioned Estates had been sold, and, out of the Proceeds, all or most of the Creditors named in the Schedules to the Release of November 1824, had received considerable Sums in or towards payment of their Debts: that that release and the other Trust Deeds comprised the whole of Lord *Egmont's* Property: that the Plaintiff, whose Debt still remained due, had requested the Trustees of the Release to permit him to execute that Deed, but they had refused so to do: that the Plaintiff, being unable to obtain payment of his Debt by any other means, had brought an Action on his Bond in the Common Pleas against Lord *Egmont*, and had obtained a Judgment *which had [*314] been duly docketed, and had issued Writs of *elegit* and *feri facias* thereon, directed to the Sheriff of *Somersetshire*; but the Plaintiff was

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advised that, under the circumstances before mentioned, he could not have the benefit of his Judgment against the Trust Estates comprised in the Release, without the assistance of the Court of Chancery. The Bill prayed that the amount of the Principal, Interest and Costs due to the Plaintiff on his Judgment, might be raised and paid to him out of such parts of the Trust Estates comprised in the Release of November 1824, as should not be sold in due execution of the Trusts thereby created for payment of Lord *Egmont's* Debts, or out of the Surplus of the Monies produced by the Sale, Mortgage, or other disposition of such Estates and the Rents, Profits and Produce thereof in a due execution of the Trusts, after the payment of such Debts; and that, for the purposes aforesaid, *all necessary Accounts might be taken* of what was due to the Plaintiff on his Judgment, *and of the Trust Estates, and the Receipts and Payments of the Trustees under the Release*; and that a Receiver might be appointed of the Rents of those Estates, or so much thereof as had not been sold or disposed of in execution of the Trusts, and that in the meantime the Trustees might be restrained from paying, to Lord *Egmont*, and that he might be restrained from taking possession of or receiving any part of the Trust Estates, or the Rents, Profits or Produce thereof.

The Defendant *Tierney* demurred for want of Equity, and, *ore tenus*, because none of the Creditors who had executed the Release of November 1824, were Parties to the Bill.

[*315] *Sir *E. Sugden* and Mr. *Girdlestone*, Junior, for the Defendant *Tierney* :

The Plaintiff is a Bond Creditor of Lord *Egmont's*; but he has not executed the Release, and, therefore, his right is adverse to that Deed, and he cannot claim anything as a *cestui que Trust* under it. He asks for an Account of the Trustees' Receipts and Payments, in order to ascertain the Surplus: but he is not entitled to compel the Trustees to render an account to him, which they must render to their *cestui que Trusts*. The Bill might, perhaps, have been sustained, if it had alleged that the Trusts had been performed, and that the Trustees had an ascertained Surplus in their hands. But it proceeds on the speculation that there will be a Surplus, and it alleges that the Trusts have not been performed, and that the Debts have not been paid.

Mr. *Knight* and Mr. *Hayter* for the Plaintiff :

If *Lord Dillon v. Plaskett* (a) and *Lewis v. Lord Zouche* (b) be Law, the Plaintiff has a right to obtain, in this Court, the relief he asks. The Trustees represent the body of Creditors, and, therefore, it is sufficient to make them parties. The Surplus is not all that Lord *Egmont* is entitled to :

(a) 2 Bligh, New Ser. 239.

(b) *Ante*, Vol. II. p. 288.

1833.—Woollams v. Baker.

by the Decd, an annual Sum was directed to be raised for his benefit : that annual Sum is liable to be affected by the *Elegit*. The question, whether it is necessary to make the Creditors Parties, has been decided by *Lewis v. Lord Zouche*. Besides, the Plaintiff has, substantially stated, in his Bill, that he cannot ascertain who the Creditors are.

Sir *E. Sugden*, in reply :

This is the Demurrer of one of the Trustees, and *not of Lord [*316] *Egmont*. They cannot be decreed to account in the absence of the Creditors. In *Lewis v. Lord Zouche* the *Master* has found that certain Persons were entitled to Annuities, and there was an ascertained Surplus which was payable to Lord *Zouche*. Bnt, here the Surplus has not been ascertained ; the Debts have not been paid, nor have the Estates been sold. In *Dillon v. Plaskett* also, a clear sum of 5,000*l.* a year was secured to Lord *Dillon*.

The VICE-CHANCELLOR, having referred the Briefs in *Newton v. Lord Egmont*, said :—I confess it appears to me that the Creditors are necessary Parties.

Demurrer *ore tenus* allowed, with liberty to amend by adding Parties.

WOOLLAMS v. BAKER.

1833: 13th November.—Practice.—*Pro Confesso*.

Where a Bill is ordered to be taken *pro confesso*, the Decree may be made subsequently, although it is usually taken at the same time.

In this Case there was one Defendant only, and an Order had been obtained for taking the Bill *pro confesso* against him, but no Decree had been then made. The Registrar having declined to set down the Cause for the purpose of the Decree being made, on the ground that the Decree ought to have been obtained at the time when the Order for taking the Bill *pro confesso*, was made :

Mr. *Wakefield*, for the Plaintiff, now applied to have the Cause set down. He said that, though the Plaintiff *might have taken [*317] a Decree when the Order was made, he was not compellable so to do.

And the *Vice-Chancellor* being of that opinion, directed the Cause to be set down, and the Clerk in Court to attend with the Record.

The following Cases were referred to by Mr. *Wakefield*: *Ellis v. Edwards* (a), in which the Order for taking the Bill *pro confesso* was made on the 30th of May 1769, and the Decree on the 8th of June 1769, and *Landon v. Ready* (b), where the Order was made on the 27th of March 1821, and the Decree the 11th of November 1821.

(a) Not reported.

(b) See 1 Sim. & Stu. 44; and *Baker v. Keen*, ante, Vol. IV. p. 493.

 1835.—*Casborne v. Barsham.*

CASBORNE v. BARSHAM.

1835: 2d July.—*Insolvent Debtor.—Plea.*

To a Bill filed by the Assignee of an Insolvent Debtor, the Defendant pleaded that the Consent of the Creditors and of the Insolvent Debtors' Court, to the institution of the Suit, had not been obtained. Plea over-ruled.

THE Plaintiff was the Assignee of the Estate and Effects of one *Chandler*, who had taken the benefit of the Insolvent Debtors' Act, 7 Geo. 4, c. 57. The object of the Bill (which contained an allegation that the Suit had been instituted with the consent in writing of the major part of the Creditors of the Insolvent, and with the approbation of the Insolvent Debtors' Court,) was to have a Deed, which the Insolvent had executed to the Defendant, delivered up to be cancelled, on the ground that it had been fraudulently obtained.

[*318] "The Defendants pleaded: "That, by the Statute made and passed in the 7 Geo. 4, intituled 'An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors in *England*,' it is enacted and provided, that no Suit in Equity shall be commenced by the Assignee or Assignees of any Insolvent without the approbation of the Court for Relief of Insolvent Debtors in *England*, or of one of the [*319] Commissioners thereof:"* and they averred that the Suit was commenced without such approbation having been obtained.

Mr. *Elderton*, in support of the Plea, called the attention of the Court

* Sect. 24 of the Act, which is partly set forth in the Plea, enacts as follows; "That it shall and may be lawful for the Assignee or Assignees of any such Prisoner, and such Assignee or Assignees is and are hereby empowered to sue from time to time, as there may be occasion, in his or their own Name or Names, for the recovery, obtaining and enforcing of any Estate, Effects or Rights of such Prisoner, but in Trust for the Benefit of such Assignee or Assignees and the rest of the Creditors of such Prisoner, according to the Provisions of this Act; and to give such Discharge and Discharges to any Person or Persons who shall be respectively indebted to such Prisoner as may be requisite, and to make Compositions with any Debtors or Accountants to such Prisoner, where the same shall appear necessary: and to take such reasonable part of any such Debts as can, upon such Composition, be gotten, in full discharge of such Debts and Accounts, and to submit to Arbitration any difference or dispute between such Assignee or Assignees, and any Person or Persons, for or on account or by reason of any Matter, Cause or thing relating to the Estate and Effects of such Prisoner: provided, nevertheless, that no such Composition or submission to Arbitration shall be made, nor any Suit in Equity be commenced, by any such Assignees, without the consent in writing of the major part in value of the Creditors of such Prisoner, who shall meet together pursuant to a Notice of such Meeting, to be published at least 14 days before such Meeting, in the *London Gazette*, and also in some Newspaper most usually circulated in the neighbourhood of the place where such Prisoner had his or her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said Court, or of one of the Commissioners thereof."

1835.—*Casborne v. Barsham.*

to the question being raised by Plea and not by Demurrer, and cited *Ocklestone v. Benson* (a), *Doe v. Spencer* (b), *Bevan v. Lewis* (c), *Bozon v. Williams* (d), *King v. Tullock* (e), *Jones v. Yates* (f), *Dance v. Wyatt* (g), *Smith v. Biggs* (h), *Piercy v. Roberts* (i), *Allison v. Rayner* (k), *Bensley v. Bignold* (l).

Mr. G. Richards, in support of the Bill, relied on *Piercy v. Roberts*, *Jones v. Yates*, *Dance v. Wyatt*, and *Doe v. Spencer* (m), and said that the object of the Legislature, in requiring the Consent of the Creditors and of the Insolvent Debtors' Court, to the institution of a Suit, was not to screen the Debtors, but to protect the Estate of the Insolvent: that, as the Act gave the Assignee a power which the Law did not give him, namely, to sue, in his own Name, for *Choses in Action* belonging to the Estate, it imposed upon him the necessity of obtaining the Consent of the Creditors and of the Court; without which he would not be entitled to retain his Costs out of the Estate: that the question was a ques- [*320] tion of Law, and therefore, it was immaterial whether it was raised by Demurrer, by Plea, or at the hearing of the Cause.

The VICE CHANCELLOR:

This case has been very fully and ably argued: and I am glad it has occurred, as it gives me an opportunity of deciding the question as I think, in reason and Law, it ought to be decided.

In *King v. Tullock*, if I had had to decide the question originally, I should have decided it otherwise than I did, but I felt myself bound by the high Authority of Sir J. Leach in *Ocklestone v. Benson*: for I remember Lord Eldon saying that a single Decision, unappealed from, ought not to be disregarded. The first Decision by Sir W. Alexander, was in conformity to the Decision of Sir J. Leach: but, on further consideration his Lordship changed his Opinion. And it appears that, when the general point again came before Sir J. Leach, in *Piercy v. Roberts*, he did not choose to decide it without conferring with some of the Judges of the Courts of Common Law. He did confer with them, and their Opinion was that the Provision made by the Statute, was to be considered as made for the benefit of the Creditors alone, and that it was not competent to the Defendants to take advantage of the objection that the Suit had been instituted without the Consent of the Creditors: that Opinion was in conformity to the Decision in *Dance v. Wyatt*, and *Doe v. Spencer*.

It could not be the intention of the Legislature to prevent the Assignee of an Insolvent Debtor from immediately *filing a Bill; [*321]

(a) 2 Sim. & Stu. 265.

(d) 2 Youn. & Jerv. 475.

(g) 6 Bing. 486.

(k) 7 Barn. & Cress. 441.

(b) 2 Bing. 203.

(e) *Ante*, Vol. II. p. 469.

(h) *Ante*, Vol. V. p. 391.

(l) 5 Barn. & Ald. 335.

(c) 2 Glyn. & Jam. 245.

(f) 3 Youn. & Jerv. 373.

(i) 1 Myl. & Keen, 4.

(m) 3 Bing. 203.

1833.—Att-Gen. v. Corporation of Rochester.

for there might be a case in which any delay would be attended with the total destruction of the Property, as, for instance, a case of Waste.

My opinion is that the Plea ought to be over-ruled, but without Costs, owing to the conflict of Authorities, and because the Plaintiff has thought proper to allege, in his Bill, that the consent and approbation of the Creditors and of the Court had been obtained.

HASLUCK v. STEWART.

1835 : 24th July.—*Practice*.—*Process*.

Where a Defendant has been served with a Subpoena under 2 & 3 W. 4, c. 33, Personal Notice must be given to him before any subsequent Process is applied for.

MOTION for an Attachment for want of Answer against a Defendant resident in *Scotland*, who had been served with a Subpoena, under 2 & 3 Will. 4, c. 33 (a), and had appeared to the Bill.

The question was, whether Notice of the Motion ought to have been given to the Defendant.

Mr. *Koe*, for the Plaintiff.

Mr. *Jacob*, for the Defendant.

The *Vice-Chancellor* said, he would confer with the *Master of the Rolls* upon the subject.

On a subsequent day His *Honor* said that he had consulted the *Master of the Rolls*, and that they were both of opinion that, where a Defendant had been served with a Subpoena under the Act, no subsequent Process ought to be granted, except upon a Motion of which Personal Notice had been given to the Defendant.

[*322] *ATTORNEY-GENERAL v. THE CORPORATION OF ROCHESTER.

AFTER the Report of this Case (*ante*, p. 273) was sent to press, the Reporter was referred to the after-mentioned Acts of Parliament, from which it appears that Lepers and Bedridden people, were authorised to appoint persons called Proctors, to gather Alms for their relief. See 1 Edw. 6, c. 3, s. 19 ; 3 & 4 Edw. 6, c. 16, s. 7.

In 14 Eliz. c. 5, (for the punishment of Vagabonds) Persons that be, or

(a) See *Parker v. Lloyd*, *ante*, Vol. V. p. 508.

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utter themselves to be Proctors, going about the country, without sufficient authority derived from the Queen, are mentioned as offenders within the Act, s. 5.

Burn probably alludes to them, when he mentions, as one description of Persons who are to be deemed Rogues and Vagabonds: "Persons going about as Collectors for Prisons, Gaols or Hospitals." See *Burn's Just.* vol. 4, p. 412, 18th edit.

Watts, the founder of the Charity, was Recorder of *Rochester*.

END OF PART II. VOL. VI.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

MOORE v. LANGFORD AND WIFE.

1835: 8th July.—*Exceptions.*

If one general exception is taken to the Master's Certificate, approving of Interrogatories under a Decree, and the Court is of opinion that one only of the Interrogatories ought not to have been approved of, the Exception will be allowed.

Interrogatories.—If, in a Creditor's Suit, a Decree is made in the usual form, no special Interrogatory for the examination of the Defendants, ought to be allowed, although a Case for directing special Inquiries, is made on the Record.

THIS was a Suit on behalf of the Creditors of *J. W. Waters*, deceased, against Mr. and Mrs. *Langford*, the latter being the Administratrix of the deceased.

The Bill charged the Defendants with misconduct in the administration of the Assets, and, in addition to the usual prayer, asked that Mr. *Langford* might be ordered to pay the Costs of the Suit, in case the Intestate's Estate should be insufficient to pay the same together with the Debts and Funeral Expenses.

The Defendants, by their Answer, admitted that since the Bill was filed they had paid three of the Intestate's simple contract Debts, to the amount of 21*l.* 10*s.* 9*d.*, and had expended the residue of the Assets which remained in their hands, in obtaining the Letters of Administration.

[*324] *The Decree neither contained any declaration, nor any special inquiries, but was in the usual form.

The Master allowed certain Interrogatories for the examination of the Defendants pursuant to the Decree; the two first and the last of which were the common Interrogatories for the examination of personal Representatives; but the third was special, and asked whether the Defendants had not, since the filing of the Bill, paid any and what Debts of the Intestate, and

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to whom, and for what reasons, and on what accounts the same were due; and whether such Debts were really due, and whether such Payments were not made, voluntarily, to Relations or Connections of the Defendants, without any proceedings or applications to obtain payment, and for the purpose of defeating the Plaintiff in this Suit, and under some Agreement or understanding that the sums paid should be returned. The Interrogatory then inquired after Letters and other Papers, in the Defendant's possession, relating to the matters thereby inquired after, and required the Defendants to set forth a list of them, and to set forth the purport of such of them as they had destroyed.

The Defendants excepted to the *Master's* Certificate, in the following terms:

"For that the said *Master* has, by his Certificate, certified that, in pursuance of the Decree made in this Cause, dated the 21st December 1831, he had settled and allowed the following Interrogatories for the examination of the Defendants." All the Interrogatories were then set forth, at full length; and the Exceptions concluded as follows:

"Whereas the said *Master* ought not to have allowed such [*325] Interrogatories."

Mr. *Wakefield* and Mr. *K. Parker*, in support of the Exception, contended that the Decree being the common Decree in a Creditor's Suit, the third Interrogatory, to which alone they objected, ought not to have been allowed.

Mr. *Knight* and Mr. *James*, for the Plaintiff, said that the Exception extended to all the Interrogatories, and as it had been admitted that the *Master* was right in allowing three of them, the Exception covered too much, and ought, therefore, to be overruled. *Pearson v. Knapp* (a); *Hodges v. Salomons* (b); *Green v. Weaver* (c).

Secondly: that the third Interrogatory was proper in consequence of the payments made, by the Defendants, to Creditors of the Intestate, after the Bill was filed: that, after Bill filed, the Personal Representative could not prefer any Creditors; that, at any rate, such preference was open to suspicion, and justified the Interrogatory.

Mr. *Wakefield*, in reply, said that the Case appearing on the Record and no special Inquiries being directed by the Decree, it was improper and irregular to exhibit a special Interrogatory: that a Personal Representative had a right to prefer a Creditor, after Bill filed and at any time before a Decree; *Maltby v. Russell* (d): that the Cases cited turned on the grammatical construction of particular Exception, and did [*326] not decide that several matters or objections might not be includ-

(a) 1 Myl. & Keen, 312.

(b) 1 Cox, 249.

(c) *Ante*, Vol. I. p. 404.

(d) 2 Sim. & Sta. 227.

 1833.—Moore v. Langford and Wife.

ed in one Exception, as was evidenced by the leave repeatedly given to amend the Exception to which the objection applied, by adding such words as, "or some or one of such particulars," which had been done in some of the Cases cited, and in the recent Case of *Russell v. Dight*, before Sir John Leach, Master of the Rolls, in Hilary Term 1834, in *Carbonell v. Bessell*, before The present Vice-Chancellor in the same year, and in *Gompertz v. Best*, before Lord Lyndhurst, Chief Baron, in December 1834, that, if the Exception was that the Master was wrong in all and each particular, then, if he was right in any particular, the Exception failed; but if, as in this Case, the Exception was that the Master ought not to have allowed such Interrogatories, then, if the Master had improperly allowed any, or any part of any Interrogatory, the Exception was good.

The VICE-CHANCELLOR :

With respect to the question of Form, I think that it sufficiently appears, by the Judgments in the Cases of *Green v. Weaver*, and *Pearson v. Knapp*, that the Decisions of the Judges depended on the Form in which the Exceptions were framed, and that they decided on the Form. Those Decisions do not afford any such general Rule as appears, at first sight, to be laid down by Lord Alvanley, M. R., in *Hodges v. Salomons*, and the Case of *Bailey v. Timperon* (e), decided on the 31st January 1827, which is mentioned in a note in my own copy of *Cox's Reports*.

If the Master allows all the Exceptions, and the Exception to [*327] his Report, it is because he ought not to have allowed all of them, the party excepting will succeed if he shows that the Master was wrong in allowing one; but, if the Exception is because the Master ought not to have allowed any, then, if one was proper to be allowed, the general Exception fails as to all: and the distinction appears to me so obvious, that I cannot conceive that any person could have any doubt on the subject. I am of opinion, therefore, that the Exception in this Case is right in Form.

The next question is, whether the Master was right in allowing the third Interrogatory. It struck me, when I first read that Interrogatory, that it was in such a Form as I never saw before, and that, if it were generally followed, a trap would be laid for a man's conscience. This is one reason why I do not feel inclined to support it. Besides, I doubt very much, if a Decree in a Creditor's Suit be made in the common Form, whether any such Interrogatory ought to be allowed at all. At all events, this Interrogatory ought to be modified or allowed in part only: and, consequently, I shall refer it back to the Master to review his Certificate, so far as the third Interrogatory is concerned.

1835.—Tytherleigh v. Harbin.

WALTON v. MERRY.

1835: 24th Nov.—*Practice*.—*Infant trustee*.—*Construction of 11 Geo. 4 and 1 Will. 4. c. 60.* Where the Court, in any proceeding in a Cause declares a Party to be a Trustee within 11 Geo. 4 & 1 Will. 4 c. 60, it may, by the same Order, direct a Conveyance to be made.

THE Question in this Case was, whether, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 11, the Infant Heir of a Vendor could be ordered, by the Decree, to convey to the Purchaser, or whether the Order must not be obtained by Petition.

Mr. Webster contended that a Petition was not necessary.

Mr. James Russell, *contra*, referred to *Fellowes v. Till (a)*, and *Prytharch v. Havard (d)*.

The Vice-Chancellor said he was of opinion, on the first words of the Section, that, where the Court, in any proceeding in a Cause, declares a Party to be a Trustee, it may, by the same Order, direct a Conveyance to be made.

*TYTHERLEIGH v. HARBIN.

[*329]

1835: 24th Nov.—*Will*.—*Construction*.

Testator devised an Estate to Trustees, in Trust for R. T. for Life, and after the death of R. T., in Trust to convey the Estate unto, between or amongst all and every and such one or more of the Child or Children of R. T. who should be living at his decease, and the Issue of such of them as should be then dead leaving Issue, such Issue to take between or amongst them the Share which their Parent or Parents would have been entitled to if then living. R. T. survived the Testator, and died leaving several Children and the Issue of another Child who was dead at the date of the Will. Held that such Issue were entitled to take, amongst them, an equal Share of the Estate with the surviving Children.

THOMAS TYTHERLEIGH, by his Will dated the 8th of February 1830, devised to Trustees and their Heirs his Estate in the Parish of *Yeovil*: "Upon Trust that my said Trustees, or the Survivors or Survivor of them, his Heirs, Executors or Administrators do and shall, at their or his discretion, demise or lease the said Estate, Lands and Premises, for such terms, and in such manner as they or he shall think proper and most for the benefit of the said Estate, and upon Trust to receive the Rents, Issues and Profits and yearly Proceeds thereof, as the same shall respectively become due and payable and be received, and pay the same unto my Brother *Robert Tytherleigh*

(a) *Ant2*, Vol. V. p. 319.

(b) *Ant2*, p. 9.

1835.—Tytherleigh v. Harbin.

during his Life, by half-yearly payments, for his own use and benefit, but not by way of anticipation; and, from and immediately after the decease of the said *Robert Tytherleigh*, then upon Trust that they my said Trustees, or the Survivors or Survivor of them, his Heirs, Executors or Administrators, do and shall convey, assign, transfer and make over the said Estate, Lands and Premises unto, or between or amongst all and every, and such one or more of the Child or Children of the said *Robert Tytherleigh* who shall be living at the time of his decease, and the Issue of such of them as shall be then dead leaving Issue, such Issue to take between or amongst them the Share only which their Parents or Parent would have been entitled to if then living, their Heirs, Executors and Administrators, as Tenants in Common and not as Joint Tenants, to and for their own absolute use and benefit.

The Testator died on the 23d of December 1833.

Robert Tytherleigh died on the 15th of February 1834, leaving the Plaintiffs his only Children him surviving, and without having had any Child who died leaving Issue since the date of the Will.

The Plaintiffs, conceiving that they were the only persons beneficially interested in the Estate, agreed to sell it to the Defendant, who refused to complete his Purchase, alleging that the Issue of *James Tytherleigh*, (a Child of *Robert Tytherleigh*, who died before the date of the Will), were entitled, under it, to the Share which their deceased Father would have taken in the Estate, if he had been living at the death of *Robert Tytherleigh*. The Plaintiffs, however, contended that *James Tytherleigh* having died previously to the date of the Will, his Issue were, according to the true construction of the Will, excluded from any Share or Interest in the Estate.

The Bill prayed for a Specific Performance of the Agreement.

The Parties having agreed to abide by the decision of the Court,

Mr. Knight and Mr. Amplett, for the Plaintiffs, said that the Children of *Robert Tytherleigh* living at his decease, were the primary Devisees, and that nothing was given to their Issue, except by way of [*331] substitution; and, consequently, as *James Tytherleigh* died before the date of the Will, his Issue could not be entitled to any Interest in the Estate. *Christopherson v. Naylor* (a); *Thornhill v. Thornhill* (b); *Butler v. Osmoney* (c); *Waugh v. Waugh* (d).

Mr. Kindersley and Mr. Berrey, for the Defendant:

In this Case there is a substantive, original Gift to the Children and the Issue of deceased Children of *Robert Tytherleigh*. In *Christopherson v. Naylor*, there was a substantive Gift to the Children only. So, in *Thornhill v. Thornhill*, the Nephews and Nieces of the Testator were, alone, the pri-

(a) 1 Mer. 320.

(b) 4 Madd. 327.

(c) 4 Russ. 70.

(d) 2 Myl. & Keen, 41.

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mary Legatees : and, in *Butter v. Ommaney*, there was no original Gift to the Children of the Testator's Brothers and Sisters.

According to the reasoning of Sir *John Leach*, Master of the Rolls, in *Waugh v. Waugh*, *Eleanor Waugh* ought to have taken a Share in the 5,000*l.* ; for her Father would have taken, if he had been living. Here the words are, " If then living ;" and *James Tytherleigh* would have taken a Share if he had been living at the death of *Robert Tytherleigh*.

Mr. *Knight*, in reply :

No Case can be produced in which, under a Devise of this description, the Issue of a pre-deceased Child have been admitted to a Share. The Testator had in mind a Child or Children then living By the words : " The Issue of such of them as shall be then dead," *he [*322] could not mean the Issue of a Child or Children, who could not, by any possibility, take. The Case turns on this : was it or was it not substitution that was intended ? The Issue were to take only what the Parent would have taken if then living, and the deceased Child could not have taken.

The VICE-CHANCELLOR :

In this Case there is an original substantive Gift to the Child or Children of *Robert Tytherleigh* living at the time of his decease and the Issue of such of them as should be then dead leaving Issue ; and I think that the word " them" means nothing more than " Child or Children." This Case, therefore, differs from the first three Cases cited for the Plaintiffs. The Testator then says : " Such Issue to take, between or amongst them, the Share only which their Parent or Parents would have been entitled to, if then living." These words were necessary in order to show what Share the Issue of a deceased Child were to take amongst them ; for, if there had been two surviving Children and Ten Children of a deceased Child, and those words had not been used, there might have been a question whether each of the ten Grandchildren was not entitled to an equal Share with the two surviving Children.

In *Waugh v. Waugh* the Decision might, I think, have been supported on the ground that the Testator, by making a separate Provision for *Eleanor Waugh* in a subsequent part of his Will, had shown an intention to exclude her from any Share of the 5,000*l.*, and thereby had, himself, put a construction on the language which he had previously used.

*I think that I am not overruling *Waugh v. Waugh*, or any of [*333] the other Cases that have been cited, if I hold, merely on the language of this Testator, that the Issue of the deceased Child are entitled to take.

1829.—*Kemble v. Kean.*

KEMBLE v. KEAN. (a)

1829 : 1st December.—*Jurisdiction.*—*Agreement.*—*Injunction.*

The Proprietors of Covent garden Theatre agreed with an Actor, that he should act for Twenty-four Nights, during a certain Period of Time, at their Theatre, and that, in the meantime, he should not act at any other Place in London. Held that the Court cannot enforce the positive part of the Contract, and therefore, it will not restrain by Injunction a breach of the negative Part.

IN February 1828 an Agreement in writing to the following effect, was made between the Plaintiffs, who were the Proprietors of *Covent-garden* Theatre, and the Defendant, a celebrated Actor: that the Defendant should act at the Theatre for 24 Nights, at a Salary of 50*l.* for each Night: that the Engagement should commence on the 1st October, and conclude before Christmas then next: that the Defendant should give the preference, to the Plaintiffs, in the renewal of an Engagement, and should not perform at any other Theatre in London during the period of his Engagement.

The Defendant, accordingly, acted 16 Nights; but was unable to complete his Engagement before Christmas 1828, in consequence of an accident that happened to the Gas-works in the Theatre. An Agreement was then made between the Parties, for a new Engagement to commence after Christmas 1828, for 12 Nights performance, (instead of the eight that [*334] remained under the *first Engagement) upon the same terms as before. The Defendant, accordingly, acted on the Nights of the 5th and 8th of January 1829, and was to have acted again on the 12th, but, on that Night, he was unable to appear before the Public. Shortly Afterwards, the Defendant having expressed a wish to suspend his performance in London and retire into the Country to recruit his Health and study some new Parts, the Plaintiff *Kemble* informed him, by Letter dated the 21st January 1829, that the Plaintiffs acceded to his Wish, it being understood that he would be ready, on the commencement of the Season 1830-31, to return, when required, to his Engagement, of which 10 Nights remained uncompleted, and that, in the meantime, he was not to act in London. The Defendant wrote an Answer to this Letter, on the 22d of January, stating that he accepted the Proposals made by the Plaintiffs.

In November 1830, the Defendant returned to *London*, and, shortly afterwards, entered into an Engagement to act at *Drury-lane* Theatre; upon

* A Report of this Case, which was omitted in its proper place, is now given, as it was referred to and much observed upon in the next Case. The Reporter had no Notes of the Arguments. The Judgment was taken from a Short-hand Writer's Notes, which The Vice-Chancellor perused on the hearing of the next Case, and said were correct.

1829.—Kemble v. Kean.

which the Bill in this cause was filed, praying that the Defendant might be decreed specifically to perform his Agreement with the Plaintiffs, contained in the Letter of the 21st of January 1829, and that, in the meantime, he might be restrained from acting at *Drury-lane Theatre*, or at any other Place in *London*.

On the 28th of November, Lord *Lyndhurst*, C., granted an Injunction, *ex parte*, restraining the Defendant from acting at *Drury-lane* or any other Place in *London*, until he should have acted 10 Nights at *Covent-garden*, with Liberty to the Defendant to move to dissolve the Injunction before The *Vice-Chancellor*.

The Motion to dissolve was now made by Mr. *Knight* and Mr. *Wright*, and opposed by Mr. *Pemberton*.

The VICE-CHANCELLOR :

The Agreement in question is such an one as this Court cannot perform.

In the case of a mere Contract between two persons who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the Party contracted with intends to carry on his trade, the whole Agreement is of so genuine a kind, that the Court would enforce the Performance of the Agreement by restraining the Party, by Injunction, from breaking the Agreement so made.

In the Case where the Parties are Partners, and one of the Partners contracts that he shall exert himself for the benefit of the Partnership, though the Court, it is true, cannot compel a Specific Performance of that part of the Agreement, yet, there being a Partnership subsisting, the Court will restrain that Party (if he has covenanted that he will not carry on the same trade with other Persons) from breaking that part of the Agreement. That is in case of a Partnership.

In the Case of *Morris v. Colman* (a), the Bill was filed by *Morris* against *Colman*, for the purpose of having a question upon the Articles of Partnership, determined, and for restraining *Colman* from doing many acts which he was disposed to do ; and I think, in that case [*336] (for I was Counsel for *Colman* from the beginning to the end), that *Colman* always stood on the defensive. The only question was whether *Colman* should be at liberty to do certain acts which he insisted he was at liberty to do, and *Morris* contended he was not. Now I apprehend that what Lord *Eldon* says, in giving his Judgment upon that point, must be taken with reference to the subject that was before him : and I perfectly well recollect the time when the Injunction was granted to restrain Mr. *Colman*, but I am not quite sure it is exactly in the way in which the Report represents ; but *Colman* insisted, generally, that he had a right to write Dramatic

(a) 18 Ves. 437.

1829.—*Kemble v. Kean.*

Pieces for other Theatres ; and then there was an Injunction granted to restrain the Representation of one of the Pieces which he had written, and which was intended to be represented, I think, at *Covent-garden* Theatre. In the Argument it was said that the particular Provision which is stated in the Case, was a Provision restraining *Colman* from writing Dramatic Pieces for any other Theatre ; and, in the Argument, it was said, by the Counsel for the Plaintiff, that that Provision was no more against public policy than a Stipulation that Mr. *Garrick* should not perform at any other Theatre than that at which he was engaged, would have been. Now, with reference to what was said, by Counsel, upon arguing the Case of a Partnership, Lord *Eldon* says : “ If Mr. *Garrick* was now living, would it be unreasonable that he should contract with Mr. *Colman* to perform only at the *Haymarket* Theatre, and Mr. *Colman* with him to write for that Theatre alone. Why should they not thus engage for the talents of each other ? ” That mode of putting the question appears to me to show that Lord *Eldon* is speaking of a

Case where the Parties are in Partnership together ; because it [*337] would be a “strange thing” that one should contract to perform only at the *Haymarket* Theatre, and the other, to write for that Theatre alone, except in the Case of a Partnership, where both Parties would be exerting themselves for their mutual benefit ; because, if they were not in Partnership, the effect of such an Agreement might be that neither might exert his talents at all. In this Case, however, there is no Partnership whatever between the Proprietors of *Covent-garden* Theatre and Mr. *Kean* ; but the Contract is nothing more than this, that Mr. *Kean* shall, for a given Remuneration, act a certain number of Nights at *Covent-garden* Theatre, with a Proviso that, in the meantime he shall not act at any other Theatre ; and it is quite clear that this Bill is filed for the purpose of having the Performance of an Agreement with regard to his Contract to act.

[His *Honor* here stated the substance of the Bill, and then proceeded :] —So that it was an Agreement to act at *Covent-garden* Theatre, a certain number of Nights in the Season 1830-31, and that, in the meantime, the Defendant should not act in *London* : and the Bill is filed for the purpose of enforcing the performance of that Agreement, which mainly consists in the fact of his acting ; and it appears to me, that it is utterly impossible that this Court can execute such an Agreement.

In the first place, independently of the difficulty of compelling a man to act, there is no time stated ; and it is not stated in what Characters he shall act ; and the thing is, altogether, so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. *Kean* shall perform his Agreement. There can be no prospective declaration or direction of the Court, as to the performance of the Agreement ; and, sup-

1829.—Kemble v. Kean.

posing "Mr. Kean should resist, how is such an Agreement to [*338] be performed by the Court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an Agreement to act at a Theatre by this Court sending him to the *Fleet* for refusing to act at all? There is no method of arriving at that which is the substance of the Contract between the parties, by means of any process which this Court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that, where the Agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this Court, and it is only guarded by a negative Provision; this Court will leave the parties, altogether, to a Court of Law, and will not give partial relief by enforcing only a negative stipulation. I think, for the reasons which I have stated, that what Lord Eldon has said in the case of *Morris v. Colman* bears upon this Case.

In *Clark v. Price* (b) (in which, also, I was of Counsel,) there was a positive stipulation by *Price*, that he would write Reports for *Clarke* the Bookseller. Lord Eldon says, in his Judgment upon that Case, "The Case of *Morris v. Colman* is essentially different from the present. In that Case, *Morris*, *Colman* and other Persons were engaged in a Partnership in the *Haymarket* Theatre, which was to have continuance for a very long period, as long indeed as the Theatre should exist. *Colman* had entered into an Agreement which I was very unwilling to enforce, not that he would write for the *Haymarket* Theatre, but that he would not write for any other Theatre. It appeared to me that the Court *could en- [*339] force that Agreement by restraining him from writing for any other Theatre. The Court could not compel him to write for the *Haymarket* Theatre; but it did the only thing in its power, it induced him, indirectly, to do one thing by prohibiting him from doing another. There was an express Covenant on his part, contained in the *Articles of Partnership*. But the terms of the prayer of this Bill do not solve the difficulty; for, if this Contract is one which the Court will not carry into execution, the Court cannot, indirectly, enforce it by restraining Mr. *Price* from doing some other act." His Lordship then proceeds to observe upon the express terms of the Contract, and says that he will not, in that case, interfere to enforce an implied, negative stipulation; for that is the utmost that can be made of his Lordship's observations in that Case.

For the reasons which I have stated, I am of opinion that, if this Cause were now being heard, and the Agreement were admitted to be such as it appears to be, this Court could not make any Decree, but must dismiss the Bill.

I should be extremely unwilling to have it thought that I am setting my

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judgment in opposition to any express opinion of The *Lord Chancellor's*. I have always thought it to be the duty of a Judge of this Court, knowing the opinion upon any point expressed by The *Lord Chancellor*, to follow it, as the immediate consequence of not following it, would be an appeal to him. It does not however appear that the attention of The *Lord Chancellor* was particularly called to this point. The application was an application *ex parte*; and, therefore, I may, without impropriety, say that my opinion is that this Injunction ought to be dissolved.

['340]

*KIMBERLEY v. JENNINGS.

1836: 28th January.—*Agreement.—Specific Performance.—Injunction.*

Where a Party agrees not to do a particular Act, and there are other Terms in the Agreement which are so vague that the Court cannot enforce them, it will not grant an Injunction to restrain the breach of the negative Term.

The Court will not give any assistance to a Party seeking to enforce a hard Bargain.

THE Bill stated that the Plaintiffs carried on the business of Factors and Merchants, in co-partnership, at *Birmingham*: that on the 27th of January 1834 they took into their employment the Defendant *Jennings*, as their Clerk, upon the terms and conditions after mentioned; and, thereupon, the Plaintiffs and the Defendant duly made and executed an Agreement, dated the 27th of January 1834, and which was as follows: "The said *John Richard Jennings*, for the considerations hereinafter mentioned, doth hire himself to the said *James Kimberley* and *William Kimberley*, and the Survivor of them, and he doth hereby undertake and agree that he will serve them and the Survivor of them, for the term of Six Years, to commence and be computed from the day of the date of these Presents, and work for and be employed by and in the name and on the behalf of the said *James Kimberley* and *William Kimberley* and the Survivor of them, in the capacities of a Clerk, Traveller and Bookkeeper, in the trade or business of Factors now carried on by the said *James Kimberley* and *William Kimberley*, in *Birmingham* aforesaid, and in obtaining orders for and selling all sorts of Goods, Wares, Merchandize and Commodities belonging thereto, and receiving the prices for the same, as they the said *James Kimberley* and *William Kimberley* or the Survivor of them, shall order and direct, and, in so doing, shall and will employ all his best services and attentions at all times, and shall and will enter and make just and true accounts, in the

['341] books of the said *James Kimberley* and *William Kimberley*, of all Goods, Wares, Merchandizes and Commodities bought and sold, Money, Bills of Exchange and Promissory Notes received and paid

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and of all other things whatsoever relating to the said trade or business which shall come or be committed to his care, management or disposal, and from time to time, remit, pay and deliver the Money, Bills of Exchange and Promissory Notes of or belonging to the said *James Kimberley* and *William Kimberley* or the Survivor of them, and make, render and give, fair and true accounts of all orders taken by him and of all actings and doings in or relating to the said trade or business, to the said *James Kimberley* and *William Kimberley* or the Survivor of them, when and so often as he shall be thereunto requested, and also shall not nor will, during the said term of Six Years, work for, or for the use or benefit of, or be otherwise engaged or employed by any other Person or Persons other than the said *James Kimberley* and *William Kimberley*, or the Survivor of them, in the capacities aforesaid, or in any other Trade, Business, Profession or Employment whatsoever, without the licence or consent of the said *James Kimberley* and *William Kimberley*, or the Survivor of them, in writing, under their or his hands or hand, for that purpose, first had and obtained : and the said *James Kimberley* and *William Kimberley*, for and in Consideration of the service of the said *John Richard Jennings* and the performance of the Agreements of the said *John Richard Jennings* herein contained, do and each of them doth, hereby, agree with the said *John Richard Jennings*, that they the said *James Kimberley* and *William Kimberley*, and the Survivor of them shall and will, from time to time during the said term of Six Years, well and truly pay or cause to be paid, to the said *John Richard Jennings*, *the Salary or Wages following, that is to say, during the [*342] first two years of the said Term, the Salary or Wages of 150*l.* per annum, during the third and fourth Years of the said Term, the Salary or Wages of 160*l.* per annum, and, during the fifth and last years of the said Term, the Salary or Wages of 200*l.* per annum, without any deduction or abatement whatsoever out of the said respective yearly Sums or Wages, save and except such as shall be made by virtue of these Presents ; and, also, shall and will, from time to time during the said term of Six Years, well and truly pay or cause to be paid, unto the said *John Richards Jennings*, all reasonable, usual, and necessary travelling Expenses. Provided that, in case the said *John Richard Jennings* shall, during the said term of Six Years, become and be incapable, from illness or indisposition, of serving the said *James Kimberley* and *William Kimberley* or the Survivor of them, in the capacities aforesaid or otherwise in the said Trade or Business according to the true intent and meaning of these Presents, or shall absent himself from or neglect the service of the said *James Kimberley* and *William Kimberley*, without their, or one of their, licence and consent, in writing, under their, or one of their hands or hand, for that purpose, first had

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and obtained, then, and in either of the said Cases, it shall be lawful for the said *James Kimberley* and *William Kimberley* and the Survivor of them, wholly and absolutely to dismiss and discharge the said *John Richards Jennings* from their service, and to discontinue the payment of the said Salary or Wages from thenceforth, or else, at their or his own option, so often as the same respectively shall happen, it shall and may be lawful, for the said *James Kimberley* and *William Kimberley* or the Survivor of them, to retain the said Sum or

[*343] *Wages, or deduct a proportionate part thereof, for the time that such incapacity or absence or neglect, as the case may be, shall endure, to and for their own use and benefit. Provided always, and it is hereby understood, agreed and declared, between and by the said Parties hereto, that, *at the end of the said term of Six Years, the said Parties hereto shall be and become Partners, in the said Business, upon such Terms, Conditions and Restrictions as shall be mutually agreed upon by the said James Kimberley and William Kimberley and John Richards Jennings.*

The Bill then stated that, for some time after the Agreement was made, the Plaintiffs employed the Defendant to travel for them, in various parts of the Country, in the way of their Business, in selling and obtaining orders for Goods and Merchandizes in which they dealt, and in receiving Monies for the same, subject, however, to such directions as the Plaintiffs thought proper, from time to time, to give him: that the Defendant having been in the employ of the Plaintiffs nearly twelve months, had become acquainted with their mode of dealing and the manner in which they transacted their Business, and became acquainted with their Customers on the different Roads or Journeys whereon they had employed him, and it was, therefore, desirable that they should, if possible, continue him in the discharge of his allotted Duties: that, on the 8th of January 1835, the Plaintiffs and *Jennings* met at *Birmingham*, and *Jennings* expressed his desire, to the Plaintiffs, to procure some better terms as to the promised Partnership with them, and pressed them to specify what proportion of the Trade he should have; but the Plaintiffs then refused to comply with such request, and informed the Defendant that that subject must be left for arrangement when the

[*344] term of his servitude under the Articles of Agreement *should expire, and would depend upon his conduct and other circumstances in the meantime: that the Defendant left the Plaintiffs without coming to any terms, but, on the following day, returned and informed them that he only wanted a Memorandum saying that he should have an Interest in the Trade on the expiration of his servitude: that the Plaintiffs, with the view of reconciling the Defendant to the due discharge of his Duty, and to obviate the inconvenience that would arise from the suspension of his ser-

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vices, were induced, on the 9th January 1835, to sign and give to the Defendant the following Memorandum :

“ We hereby undertake to give our Traveller, *John Richards Jennings*, a future Share in the Profits of our Trade, as soon as he shall have completed the Terms of his Engagement with us, being in consideration (in addition to his Salary) of his Services during his Engagement.” The Bill then alleged that the Defendant, in his subsequent dealings with the Plaintiffs’ Customers, greatly relaxed in his diligence and efforts to serve the Plaintiffs; and, on that account, they, in October 1835, deemed it expedient to employ him, as a Clerk and Bookkeeper, in their Counting-house, instead of sending him on Journeys; but he refused to be so employed, and quitted their Service, on the 6th November 1835, without their consent: that the Plaintiffs always had been, and still were ready to perform their parts of the Agreements of January 1834 and January 1835: that the Defendant had lately commenced Business, as a Factor and General Merchant, in *Birmingham*, in opposition to the Plaintiffs and contrary to the true intent and meaning of the first Agreement; and threatened to engage himself with other Factors and Merchants, and to act *for [*345] them as their Traveller, either separate, or in addition to the said Business on his own account. The Bill prayed that the Defendant might be restrained, by the Decree of the Court, and, in the meantime, by the Order of the Court during the remainder of the term of Six Years mentioned in the first Agreement, from working for or for the use or benefit of, or otherwise being engaged or employed by any other person or persons than the Plaintiffs, in the capacities in that Agreement mentioned, or in any other Trade, Business, Profession or Employment whatsoever, without the consent of the Plaintiffs, and, in particular, from carrying on the Trade which he was then carrying on, the Plaintiffs being ready and willing and thereby offering to perform the two Agreements on their parts.

The Defendant demurred for want of Equity.

Sir William Horne and *Mr. Hayter*, in support of the Demurrer :

First: The Agreement is a mere Contract for Hiring and Service at a salary, and is utterly unconnected with any existing Partnership. The Defendant was, simply, the hired servant of the Plaintiffs. They offer to perform the Agreement on their parts. The Bill, therefore, is a Bill for the Specific Performance of a Contract. But a Contract for Personal Service, cannot be made the subject of Specific Performance, unless it can be shown to have the features and character of a Partnership. If the Defendant has violated the Contract, the Plaintiffs have an adequate remedy at Law. It is true that the Agreement provides for a future Partnership; but, if the allegations in the Bill are true, the Defendant has violated the Con-

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[*346] tract, and, consequently, he can never compel the *Plaintiffs to admit him into Partnership. *Morris v. Colman* (a), *Kemble v. Kean* (b), *Flint v. Brandon* (c). Secondly: The Terms of the Partnership are not specified. At the end of the Six Years, the Parties are to become Partners on such terms as *shall be* mutually agreed upon between them. If, at the end of the Six Years, the Defendant were to file a Bill to compel a Specific Performance of the Agreement, the Court would say that it could not compel a Specific Performance of that which could not be specifically defined. There is, therefore, no mutuality between the parties. *Underwood v. Hitchcox* (d), *Flight v. Bolland* (e). Thirdly: The Injunction is merely an auxiliary remedy; and, if the Plaintiffs have not a right to come into this Court in respect of the Contract, they have no right to the Injunction. The negative Contract is merely subsidiary to the positive Contract: the Court will not enforce the latter, unless it can enforce the former. Lastly: The Agreement is illegal and void, as being against public policy: for it contains a stipulation that the Defendant shall not, during the term of Six Years, be employed in any part of the World, by any other person than the Plaintiffs, in the capacities specified, or in any other Trade, Business, Profession or Employment. *Mitchel v. Reynolds* (f).

Mr. Knight and Mr. G. Richards, in support of the Bill:

The Bill is not filed, simply, for the Specific Performance of [*347] an Agreement for the hiring of a servant, but *to restrain the Defendant from breaking a negative Covenant, by which he has bound himself not to work or carry on any trade or Business, during a certain period, for any other persons than the Plaintiffs. It is a question of serious Fraud upon Trade. Large Mercantile Houses are under the necessity of employing Agents to take orders for them. Great confidence must be reposed in such Agents; and they have the means, if so disposed, of abusing that confidence, by undermining their Employers, and ingratiating themselves with their Customers. If an Agent, in breach of his Contract, converts to his own purposes, the secrets of his Employers and the knowledge he has acquired in their service, an Equity immediately arises to the Employers. *Yovatt v. Winyard* (g); *Green v. Folgham* (h); *Cholmondeley v. Clinton* (i). It is a different question whether this Court can enforce an Agreement, and whether it will prevent the doing of an act which is a plain violation of the Contract. Independent of Specific Performance, there is a right to relief here. In *Morris v. Colman* there was both an affirmative and a negative contract. Lord Eldon did not found his Judgment,

(a) 18 Ves. 487.

(b) *Ante*, p. 333.

(c) 8 Ves. 159.

(d) 1 Vez. 279.

(e) 4 Russ. 298.

(f) 1 P. W. 181.

(g) 1 J. & W. 394.

(h) 1 Sim. & Stu. 398.

(i) 19 Ves. 261.

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in that Case, on the ground of Partnership : and, when he mentions that Case in *Clarke v. Price*, he does not speak of it as a Case of Partnership. He merely alludes to the Partnership by way of description of the Case.

[The VICE-CHANCELLOR :—*Morris v. Colman*, from the beginning to the end, was treated as a Case of Partnership. *Colman* insisted, on the footing of the Agreement that constituted the Partnership, that he was entitled to be the Manager of the Theatre to the exclusion [*348] of *Morris*, and therefore, he was insisting on the existence of the Agreement.]

According to what Lord *Eldon* says in *Clarke v. Price*, if there had been a negative Covenant in that Case, it would have been enforced. It is settled, by repeated Decisions, that the Court will interfere negatively where it cannot interfere positively ; as in the Case of *The Glamorganshire Canal Company (k)*. So this Court will interfere to prevent the breach of a Covenant not to carry on trade within certain limits ; though there may be other parts of the same Covenant which it cannot enforce. The negative Covenant in this Case, is a separate and independent Covenant, belonging to the introduction into the service. It is altogether collateral to the Covenant to serve for a given time. It does not, of necessity, follow from the affirmative Contract, nor are the two Covenants so connected together, that, if the Court cannot interfere as to one, it will not interfere as to the other. Suppose that the Defendant had been discharged for misconduct, would he then have been entitled to disclose all the secrets of his Employers ?

Next : Is the negative Covenant such a restraint of Trade as to be void ? In *Mitchel v. Reynolds*, the Court said that if a reason could be shown for the Restriction, it should prevail (l). Here the Contract is that the Defendant should not, during the term, be employed by any other Persons : it had reference to the mastery he would obtain over [*349] the secrets and connections of his Employers, and, therefore there was a reason for it.

The Injunction may, at all events, be granted in a more limited form than it is prayed, that is to say, to restrain the Defendant from availing himself of the knowledge which he has obtained of the connections and secrets of his Employers. Damages at Law would be an inadequate remedy ; for, by disclosing the secrets of the Plaintiffs, an irreparable injury would be done to them.

The VICE-CHANCELLOR :

It does not clearly appear to be the meaning of the Agreement, that, if the event happened that the Defendant did not continue, during the whole

(k) 1 Myl. & Keen, 154. See also *Rankin v. Huskisson*, ante, Vol. IV. p. 13.

(l) See 1 P. W. 192, 193.

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term of Six Years, in the Service of the Plaintiffs, he should be disabled from engaging in any other Service or Employment for the remainder of the term. It has been assumed, in the course of the Argument, that this part of the Agreement is to be taken by itself, and that, whatever might happen during the term, the Defendant should not engage in any other Employment. But, attending to the whole of the Agreement, the true Construction of it seems to be that, during such portion of the term as the Defendant should continue in the Service of the Plaintiffs, he should not enter into any other Employment; but, if he should be dismissed during the term, then that he might engage himself in the Service of other Persons. Supposing, however, the meaning of the Agreement to be such as I have stated it to

be, still it would afford a strong reason against the interference of [*350] the Court; for it would be what is commonly termed 'a Hard Bargain; inasmuch as the Agreement is so constructed that if, from illness or any other cause over which the Defendant could have no control, he should become incapable of serving the Plaintiffs, they have the option either of discharging him, or discontinuing the payment of his Salary, and insisting that, for the remainder of the Six Years, he shall not engage in the Service of any other Individual. Nothing could be more harsh towards a young Man dealing with great Traders, than that he should be allowed to enter into an Agreement, which placed him so entirely in their power. And, although events have happened which have precluded the Plaintiffs from availing themselves of this harsh Stipulation, still I must look at the Agreement as it was originally concocted, in order to see whether, on the whole, it was such as this Court would countenance.

Then, at the end of the Agreement, there is this Stipulation, that, at the end of the term of Six Years, the parties should become Partners upon such Terms, Conditions and Restrictions as should be mutually agreed upon between them. This was an essential and important part of the Agreement, and was so considered by both Parties; and, although the Performance of it was to depend on the Defendant's good Conduct, and the Terms of the Partnership were to be subsequently arranged, it is plain that he so considered it, from his having expressed his desire to the Plaintiffs, at the meeting between them on the 8th January 1835, to procure some better Terms as to be promised Partnership, and from his having pressed them to specify what Proportion of the Trade he was to have, and, further, from his having, on the following day, obtained from them the second [*351] Agreement, in which they again held out to him the prospect of a future Partnership. The whole of the Agreement must be taken together; and, though that portion of it which relates to the Partnership, is so vague and loose that the Court cannot execute it, still it is evi-

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dent that the Defendant was looking forward to the time at which he should have a Share of the Profits; and this Court is not at liberty to say that that Portion of the Agreement on which it cannot act, shall be rejected, and that the other part, on which it can act, shall be retained.

It is observable that the Bill represents that the Plaintiffs are ready and willing to perform the Agreement on their parts, but it does not ask for a Specific Performance: and it is obvious that, if the Plaintiffs were required, by the Defendant, to admit him into Partnership, they might insist on such Terms as would render it impossible that they ever should become Partners. The Plaintiffs however, by this offer, show that, in their view, the Stipulation at the end of the Agreement, was material, though they might act in such a way as that, virtually, they should not be bound by it.

Then it was said that the Court might execute a negative Contract. I admit it. I remember a Case in which a Nephew wished to go on the Stage, and his Uncle gave him a large sum of Money in consideration of his covenanting not to perform within a particular District; the Court would execute such a Covenant, on the ground that a valuable Consideration had been given for it. But here the negative Covenant does not stand by itself: it is coupled with the Agreement for Service for a certain number of Years, and then for taking the Defendant into Partnership.

*In the first place, this Agreement cannot be performed in the [*352] whole, and therefore, this Court cannot perform any part of it; in the next place, it is not to be construed as the Plaintiffs contend for: and, lastly, it is a Hard Bargain, and, therefore, this Court will not interfere. Demurrer allowed.

THE Plaintiffs had filed a similar Bill against another of their Travellers, named *Yeo*, to which he also demurred.

Mr. *Jacob* and Mr. *Sharpe* appeared in support of that Demurrer; but, as it depended on the same Principle as the former it was allowed without Argument.

BRIDGE v. BRIDGE.

1833; 1st November.—*Witness.—Re-examination.—Practice.*

Liberty given to the Plaintiff to re-examine one of his Witnesses to part of an Interrogatory as to which the Examiner had omitted to take down the Deposition.

THE Examiner having omitted to take down the Deposition of one of the Plaintiff's Witnesses to part of the Twentieth Interrogatory, the Plaintiffs

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now moved that the Witness might be at liberty to attend the Examiner for the purpose of being re-examined upon so much of that Interrogatory as was in the following words: "What passed at each and every of such Meetings, or at such Meeting at which you so attended, and, in particular, did or not the said Defendant *James Southby Bridge* produce any, and, if any, what Accounts or Account at such Meetings, or at any or either and which of them, or at such Meetings;" or that the Plaintiffs might be

[*353] at liberty to exhibit a fresh Interrogatory "for the examination of the Witness upon the Matters inquired after by the part of the Twentieth Interrogatory before set forth, with liberty for the Defendants to cross-examine the Witness on such Matters or otherwise as the Court should think fit; and that the Examiner might re-examine the Witness upon the before-mentioned part of the Twentieth Interrogatory, or examine her upon such fresh Interrogatory accordingly; and that, in the meantime, the Cause might stand adjourned, with liberty for the Plaintiffs to apply to have the same again put in the Paper for hearing.

The Motion was supported by an Affidavit made by the Plaintiff's Solicitor and the Witness, setting forth the whole of the Twentieth Interrogatory and the Deposition thereto as delivered out by the Examiner, and adding that, before the Suit was instituted, the Witness communicated to the Solicitor what passed at the several Meetings mentioned in her Answer to the Twentieth Interrogatory as delivered out by the Examiner; and that, after the Suit had been instituted, and on the occasion of the Solicitor's preparing for Counsel the Instructions for Interrogatories for the Examination of the Plaintiff's Witnesses, he again communicated with the Witness as to what passed at those Meetings, and that the Witness then again stated to him what passed thereat: that those Statements were embodied in the Instructions for the Interrogatories: that upon the day on which the Witness was examined as a Witness on the part of the Plaintiffs on the said Twentieth Interrogatory, she was also examined, as a Witness on the part of the Plaintiffs on various other Interrogatories, and that, upon her being so examined upon the said Twentieth Interrogatory, she answered that part

[*354] of it which was set forth in the Notice of Motion, and stated what passed at the several Meetings thereby inquired after, and deposed to the question whether Accounts had or not been produced by the Defendant *J. S. Bridge* thereat, and that she intended that such Statement and Deposition should be, and, at the time of her Examination, she fully believed that the same had been taken down as part of her Deposition to the Twentieth Interrogatory: that, at the close of her Examination, the Examiner read over to her her Answers to all the Interrogatories on which she had been examined, but that the Interrogatories were not then read over to her;

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that she directed her attention to the correctness of the Answers and did not then observe that her Answer to the part of the Twentieth Interrogatory before set forth, was not contained in what was read over to her: that she had read over her Depositions as contained in a Paper purporting to be an office-copy of the Depositions taken on the part of the Plaintiffs, (and which the Solicitor stated to be a correct copy of those Depositions,) and that her Answer to the before-mentioned part of the Twentieth Interrogatory, was not contained in any part of those Depositions, but, as she believed, had been omitted by some accident or inadvertence of the Examiner: that, after Publication had passed, the Solicitor, on reading the Depositions, discovered that they contained no Answer to the before-mentioned part of the Twentieth Interrogatory, and that he thereupon caused a Communication to be made, to the Witness, upon the subject, to which she replied that she had answered the whole of the Twentieth Interrogatory: that the Witness was the only person who could have been examined as to what passed at the Meetings, and that the Solicitor verily believed that, if she were re-examined on the part of *the Twentieth Interrogatory before set forth, her Answer; thereto would furnish very material Evidence for the Plaintiffs. [*355]

Mr. Knight and Mr. Turner supported the Motion; Mr. Pepys and Mr. Koe opposed it.

The following Cases were cited in support of the Motion: *Griells v. Gansell* (a), *Rowley v. Ridley* (b), *Ingram v. Mitchell* (c), *Kirk v. Kirk* (d), *Shaw v. Lindsey* (e), *Abergavenny v. Powell* (f), *Cox v. Allingham* (g).

The Vice-Chancellor ordered that the Plaintiffs should be at liberty to examine the Witness to the part of the Twentieth Interrogatory set forth in the notice of Motion, and that the Defendants should have liberty to cross-examine the Witness; that Publication should pass immediately after the examination or cross-examination (if any) should be concluded; and that the Cause should be adjourned, with liberty to the Plaintiffs to apply to have it restored to the Paper, when the Publication should have passed.

*ANSDALL v. WHITFIELD.

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1835: 9th Dec.—*Practice.*—*Contempt.*—*Construction of* 11 G. 4 & 1 W. 4, c. 36.

The 14 Days mentioned in 11 G. 4 & 1 W. 4, c. 36, s. 11, are exclusive of the first, and inclusive of the last Day.

MR. KNIGHT, on moving that a Clerk in Court might be appointed to

(a) 2 P. W. 646.

(b) 1 Cox, 281.

(c) 5 Ves. 297, see 299.

(d) 13 Ves. 280.

(e) 15 Ves. 380.

(f) 1 Mer. 130.

(g) Jac. 337, see 339.

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enter an Appearance for the Defendant, under 11 Geo. 4, and 1 Will. 4, c. 36, s. 11, said that the question was, whether the 14 Days after Notice given to the Defendant to enter an Appearance, were to be reckoned exclusively or inclusively of the Day of serving the Notice.

The *Vice-Chancellor* said that they were to be reckoned exclusively of the first and inclusively of the last Day.

LORD PORTARLINGTON v. SOULBY.

1833: 8th Nov. and 10th Dec.—*Pleading*.

Defendant pleaded, to the whole Bill, that he was a Purchaser for Valuable Consideration, without Notice, and, by Answer in support of the Plea, denied the Charges of Notice. Held that the Answer over-ruled the Plea.

THIS was a Bill by the Acceptor against the Indorsee of a Bill of Exchange, to have the Bill delivered up to be cancelled, on the ground that it had been given by the Plaintiff to secure Money lost at play to the Drawer, who had indorsed it to the Defendant, without Consideration, after it was due, and with Notice of the circumstances under which it had been accepted.

The Defendant pleaded, to the whole Bill, that he was a *bonâ fide* Purchaser of the Bill of Exchange, for Valuable Consideration, without Notice of the circumstances under which it had been accepted; and, “for better supporting” the Plea, he put in an Answer denying that the Bill [357] was indorsed to him after it had “become due, or that he had Notice of the circumstances under which it was alleged to have been accepted. But the Answer did not notice the Allegation, in the Bill, that the Defendant had, in his custody, Books, Papers, &c. from which the truth of the matters contained in the Bill would appear: and, on that account, the *Vice-Chancellor* over-ruled the Plea, holding that it was incumbent on the Defendant to give all the Discovery sought by the Bill, relating to the subject matter of the Plea.

His *Honor*, however, gave the Defendant leave to plead *de novo*.

The Defendant, accordingly, put in another Plea and Answer to the same effect as the former, and denying the Allegation omitted to be noticed in the former Answer.

Mr. *Knight* and Mr. *Sidebottom*, in support of the Plea, said that a Court of Equity would not give its assistance against the holder of a Security for Valuable Consideration, who denies Notice of any of the circumstances affecting its validity.

Mr. *Pepys* and Mr. *Bagshawe*, in support of the Bill:

The Plea is wrong in Form. The Defendant, instead of pleading to the

1833.—*Ashley v. Ashley.*

whole Bill, ought to have excepted from it so much as avoids the Bar, and then pleaded the Bar and denied, by Answer, the parts excepted. The Answer over-rules the Plea.

*Mr. *Sidebottom*, in reply, referred to Mitf. 199. Gilb. For. [*358] Rom. 57. *Bayley v. Adams (a)*, *Edmundson v. Hartley (b)*.

The VICE-CHANCELLOR :

The Plea is wrong in point of Form. It ought to have been a Plea to all the Relief and to all the Discovery sought by the Bill, except certain parts, and to those parts there ought to have been an Answer in support of the Plea. You cannot plead and answer to the same matter.

Plea ordered to stand for an Answer, with liberty to except.

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ASHLEY v. ASHLEY.

1833 : 15th Nov.—*Will.—Construction.—Cross Remainders.*

Testator devised an Estate to *A.* for Life, Remainder to Trustees to preserve, &c., Remainder to all the Children of *A.* as Tenants in Common, and not as Joint Tenants, and, for want of such Issue, to *B.* for Life, Remainder to Trustees to preserve, &c., Remainder to all the Children of *B.* as Tenants in Common, and not as Joint Tenants, and for want of such Issue, to *C.* in Fee. Held that the Children of *A.* took Estates for Life, with Cross Remainders between them, for Life, with Remainder to *B.* for Life, with Remainder to her Children, as Tenants in Common, with Cross Remainders between them for Life, with Remainder to *C.* in Fee.

By an Order in this Cause, the *Master* was directed to inquire and state, at the expense of the Estate of *Sarah Ashley*, the Widow of the Testator in the Cause, what Interest the Testator had in a certain Estate in *Friday-street* in the City of *London*. The *Master* found *that [*359] *James Lewer* being seised of the Inheritance of the Estate, in Fee Simple in possession, by his Will dated the 31st of August 1773, and duly executed and attested, gave and devised his two Freehold Houses in *Friday-street* in the City of *London*, to *John Gamon* and *Thomas Holehouse*, and their Heirs, upon Trust to and for the use and behoof of his Wife, *Mary Lewer*, and her Assigns for her Life, without Impeachment of Waste, and, from and after the determination of that Estate by Forfeiture or otherwise, to the use of *Gamon* and *Holehouse* and their Heirs, for the Life of his said Wife, in Trust to preserve the Contingent Uses and Estates therein after limited ; and, from and after the decease of his said Wife, in trust to and for the use of his Daughter, *Sarah Chandler*, (Wife of *Thomas Chandler*) and her Assigns for her Life, without Impeachment of Waste ; and, from and after the determination of that Estate, to the use of the Trustees

(a) 6 Vcs. 586.

(b) 1 Anstr. 97. See Mitf. 3d. edit. 195 to 218. See also Wigram's Points in the Law of Discovery, 37. 172.

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and their Heirs for the Life of *Sarah Chandler*, in Trust to preserve, &c., but nevertheless to permit and suffer his Daughter *Sarah Chandler* and her Assigns, notwithstanding her coverture, and whether she should be sole or covert, during her Life to receive the Rents, Issues and Profits thereof to her and their own use, and to make Entries and bring Actions for non-payment thereof as occasion should require, and, from and after the decease of *Sarah Chandler*, in Trust and to and for the use of all and every the Child or Children lawfully begotten or to be begotten on the body of *Sarah Chandler*, equally to be divided between them, if more than one, share and share alike, and to take as Tenants in Common and not as Joint Tenants: and, for want of such Issue of *Sarah Chandler*, then in Trust and to and for the use of his Daughter *Mary Hand* (Wife of *Clayton Hand*) [*360] and her Assigns for her Life, without Impeachment of Waste, and, from and after the determination of that Estate, to the use of the Trustees and their Heirs during the Life of *Mary Hand*, in Trust to preserve, &c., but nevertheless to permit and suffer the said *Mary Hand* and her Assigns, notwithstanding her coverture, and whether she should be sole or covert during her Life, to receive the Rents, Issues and Profits thereof to her and their own use, and not to be subject to the Debts, Power or Control of her then or any future Husband, and to make Entries and bring Actions for nonpayment thereof as occasion should require; and, from and after the decease of *Mary Hand*, in Trust, and to and for the use of all and every the Child and Children lawfully begotten or to be begotten on the body of *Mary Hand*, equally to be divided between them, if more than one, share and share alike, and to take as Tenants in Common and not as Joint Tenants, and, for want of such issue of *Mary Hand*, then in Trust, and to and for the use and behoof of *Thomas Chandler* the Husband of *Sarah Chandler*, his Heirs and Assigns for ever. And the Testator, after giving several Legacies, gave, devised and bequeathed all the rest, residue and remainder of his Real and Personal Estate and Effects, of what nature, kind or quality soever, or wheresoever, unto his Wife, *Mary Lewer*, her Heirs, Executors, Administrators and Assigns for ever.

James Lewer died soon after the date of his Will, leaving his Wife *Mary Lewer*, and his two Daughters *Sarah Chandler* and *Mary Hand* him surviving, all of whom died long before the date of the Report.

Sarah Chandler had Issue, by *Thomas Chandler*, eight Children living at the time of the decease of the Testator *James Lewer* or born afterwards, (that is to say) *Thomas Chandler*, *Edward Chandler*, *Harriet Chandler*, *Thomas James Chandler*, *Sarah* the late Widow of *General Christopher Ashley*, the Testator in the Pleadings named, *Mary Ann* the Widow of *Edward Butler*, the Plaintiff *Sophia* the

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Wife of the Plaintiff *David Power*, and *Matilda* the Wife of *Charles Lane*. Some of those Children were living at the date of *J. Lewer's* Will. *Thomas*, *Edward*, *Harriet* and *Thomas James*, died sometime since Infants; and *Sarah Ashley* died without Issue on the 16th of December 1827, but *Mary Ann Butler*, *Sophia Power*, and *Matilda Lane* were still living.

There were five Children of *Mary Hand* living at *J. Lewer's* decease or born since his death, but three of them only were still living.

The *Master* reported that all the Limitations in the Will failed, subsequent to the Devise to the Child or Children of *Sarah Chandler*, as being only to take effect in case there never was any such Child; and that the Children of *Sarah Chandler* took Life Estates only without Cross Remainders between them; and that, subject thereto, the Fee Simple of the houses passed, by the general Residuary Devisee, to the Widow of *James Lewer*, the Testator.

Mr. and Mrs. *Power* excepted to the Report, insisting that none of the Limitations in the Will had failed, but that, according to the true construction of the Will, all the Children of *Sarah Chandler* took Estates in Tail General, in Remainder Expectant on the determination of the Life Estate of *Sarah Chandler*, as Tenants in Common with Cross Remainders in Tail General between *them; or else that all the Chil- [*362] dren of *Sarah Chandler*, took Estates for Life, in Remainder Expectant on the determination of the Life Estates of *Sarah Chandler*, as Tenants in Common, with Cross Remainders, for Life, between them; and that, subject thereto, the Testator's daughter, *Mary Hand*, took an Estate in Remainder in the premises, for her Life, with Remainder to the Trustees, during her Life, upon Trust to preserve the Contingent Remainders therein—after limited, with Remainder to all and every the children of *Mary Hand*, as Tenants in common for Life or in Tail, with Cross Remainders for Life or in Tail amongst them, with Remainder to the use of *Thomas Chandler*, his Heirs and Assigns for ever.

The Parties having agreed to be bound by the decision of the Court:

Mr. *Knight* and Mr. *Daniell*, in support of the Exception, said that it would be difficult to contend that the Children of Mrs. *Chandler* took Estates of Inheritance, but that they took, at least, Estates for Life with Cross Remainders; that the words, “for want of such Issue,” meant the same as, “for default of such Issue;” that there was no Case that decided that Cross Remainders could not be implied between Tenants for Life; and that it was clear that the Testator did not intend his Estate to go over, till all the children of Mrs. *Chandler* were dead. *Doe v. Webb* (a); *Armstrong v. Eldridge* (b); *Doe v. Abey* (c); *Tuckerman v. Jefferies* (d).

(a) 1 Taunt. 234.

(b) 3 Bro. C. C. 215.

(c) 1 M. & S. 428.

(d) 4 Bac. Ab. 467. Dodd's edit.

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[*363] *Mr. *Pepys* and Mr. *Ching*, for Persons claiming under Mrs. *Lewer*, the Residuary Devisee, in support of the Report, said that the Gift over to Mrs. *Hand*, was not to take effect after the deaths of the Children of Mrs. *Chandler*, but for want of such Children; that the Testator was contemplating a Gift to persons who were to stand in the place of those whom he intended originally to benefit; and that, by the words: "to take as Tenants in Common and not as Joint Tenants," he had expressly excluded a Joint tenancy.

The VICE CHANCELLOR:

My opinion is directly against the finding of the *Master*.—[His *Honor* here read the Devise, and then proceeded thus:—] Now but one subject is given throughout. The expression: "for want of such Issue," means want of Issue whenever that event may happen, either by there being no Children originally, or by the Children ceasing to exist. Those words seem to me to create Cross Remainders by implication (e).

Declare that the Children of Mrs. *Chandler* took Estates for Life, as Tenants in Common, with Cross Remainders between them for Life, with Remainder to Mrs. *Hand* for Life, with Remainder to her Children, as Tenants in Common for Life, with Cross Remainders between them for Life, with Remainder to *Thomas Chandler* in Fee: and refer it back to the *Master* to review his Report.

[*364] *ROGERS v. ROGERS.

1833: 19th Nov.—*Purchaser*.—*Legacies*.

Testator devised his Estates charged with Debts and Legacies. The Devisee mortgaged the Estate to *A.*, subject, expressly, to the Legacies. *A.* having called in his Money, and the Devisee requiring a further advance, they join in mortgaging the Estate to *B.*, but not expressly subject to the Legacies, and *B.* is informed, falsely, by the Devisee, that all the Legacies had been paid. Held that *B.* took the Estate subject to the Legacies.

THOMAS ROGERS, by his Will dated the 6th of June 1794, after directing that his just Debts, Funeral Expenses, and the Charges of proving his Will should be paid by his Executrix thereafter named, gave, devised and bequeathed unto *John Yeomans* and *Peter Gravenor* all his Freehold Messuages, Lands, Hereditaments and Premises in the Parishes of *Wellington*, and *Burghill* in the County of *Hereford*, together with the Stock, Crop Implements of Husbandry, Household Goods and Furniture, Monies, and Securities for Money, and all other the Personal Estate, of what nature or kind soever, which he might die possessed of or entitled unto, to hold unto

(e) See *Green v. Stephens* 12 Ves. 419, and 17 Ves. 64.

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the said *John Yeomans* and *Peter Gravenor*, their Executors and Administrators, upon Trust to permit and suffer his Wife, *Elizabeth Rogers*, to receive the Rents and Profits of his said Freehold Estates, and, also, to have the use and enjoyment of all his Stock, Crop, and Implements of Husbandry, Household Goods and Furniture, Ready Money, and Securities for Money, to enable her the better to carry on the Farming Business (if she chose so to do) for her Life, and, after her decease, he gave, devised and bequeathed the same and every part thereof, unto his Son, *Thomas Rogers*, and to his Heirs and Assigns for ever, subject to the Payment of certain pecuniary Legacies, which the Testator then proceeded to give; and as to all the rest and residue of his said Estates and Effects, after payment and satisfaction of the aforesaid Debts, Funeral Expenses, the charges of proving his Will, and the Legacies before given and directed to be paid in manner above mentioned, he gave and bequeathed the [*365] same to his Son *Thomas Rogers*, his Heirs and Assigns for ever. And he appointed his Wife, *Elizabeth Rogers*, sole Executrix of his Will.

The Testator died on the 22d of May 1798.

By Indentures of the 9th and 10th of August 1814, after reciting that *Elizabeth Rogers* and *Thomas Rogers* had sold certain parts of the Testator's Real Estates, and, with the Monies arising therefrom, had paid off certain Mortgages for Terms of Years which had been created by the Testator, and that they had prevailed on *Joseph Baker* to advance them 500*l.*, and to accept of a Mortgage, not only of the Freehold, Fee Simple and Inheritance of the Hereditaments comprised in the Terms, but also of all other Freehold Lands, and Hereditaments of them the said *Elizabeth Rogers*, and *Thomas Rogers* thereafter mentioned, and also an Assignment of the Terms: It was witnessed that, in consideration of the 500*l.* paid, by *Baker*, to *Elizabeth Rogers* and *Thomas Rogers*, they together with *John Yeomans* and *Peter Gravenor*, conveyed all the Testator's Real Estates remaining unsold, to *Baker*, in Fee, subject to Redemption on repayment of the 500*l.* and Interest: and the Mortgagees assigned the Terms to *A. Andrews*, in Trust for *Baker*, his Heirs and Assigns. In the Covenant against Incumbrances contained in the Release, the Legacies given by the Will, and the Terms for Years, were excepted.

By Indentures of the 29th and 30th of August 1817, after reciting, amongst other things, that *Baker* had called in the 500*l.*, and that *Elizabeth Rogers* and *Thomas Rogers* were unable to pay the same, and that they having occasion for the further Sum of 50*l.*, had applied to [*366] *John Holder* to advance 550*l.*, which *Holder* had agreed to do on having the Mortgaged Estate and the Terms conveyed and assigned to him: It was witnessed that, in consideration of the 500*l.* advanced to *Baker*, and

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of 50*l.* advanced to *Elizabeth Rogers* and *Thomas Rogers*, they conveyed the Mortgaged Premises to *John Holder* in Fee, subject to Redemption on repayment of the 550*l.* with Interest: and *Andrews* assigned the Terms to *William Charles Holder*, in trust for *John Holder*, his Heirs and Assigns. *Elizabeth Rogers* died on the 19th of January 1821, having appointed her Daughter *Mary Rogers*, who was one of the Legatees named in the Testator's Will, her Executrix.

The Bill was filed, by the Legatees, against *Thomas Rogers*, *Peter Gravenor*, *John Holder* and certain other Parties, charging that *Holder*, at the time when the Mortgage was made to him, knew that the Legacies were unpaid, and that he took the Mortgage expressly charged with the Payment of the Legacies; and praying that the Legacies might be raised and paid out of the Testator's Real and Personal Estates. *Holder*, in his Answer, denied that, at the time of the execution of the Mortgage to him, he knew or believed that the Legacies were not provided for: on the contrary, he said that he was informed, by *Elizabeth* and *Thomas Rogers*, that all the Legacies had been provided for out of the Testator's Personal Estate and by the Monies raised by the Mortgage then transferred to him, and by the before-mentioned Sales of parts of the Testator's Real Estates: that the Sums raised by such Sales and Mortgage, exceeded, in amount, the Legacies and the Testator's Debts, including his Debts by Mortgage: [*368] and he submitted *that the Estates having paid and contributed the full amount of the Charges thereon, were discharged from the Legacies, and were not then liable, in his hands, to pay the same.

The *Attorney-general* and Mr. *Whitmarsh* for the Plaintiffs, said that, as *Holder* was a Purchaser from *Baker*, he took with express Notice that the Legacies remained unpaid.

Mr. *Pepys* and Mr. *R. Roupell*, for the Defendant *Holder*, said that the Mortgage made to *Holder*, was an entirely new transaction; that he dealt with *Elizabeth* and *Thomas Rogers*, and advanced them more money than was due to *Baker*, and took from them a new Security; that the Release of 1817 contained no exception of Legacies, but, on the contrary, *Holder* was assured that all the Legacies had been provided for; that, where a Trust is created for payment of Debts as well as Legacies, a Purchaser is not bound to see to the application of his Money, unless fraudulent collusion is shown. *Rogers v. Skillicorne* (a).

Mr. *Wakefield*, Mr. *Bethell* and Mr. *Whitmarsh*, jun., appeared for other Parties.

The VICE-CHANCELLOR:

By the Deeds of 1817, no Interest was conveyed in any Lands except

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those the legal Estate in which was in *Baker*. He, by the Deeds of 1814, took a Mortgage subject to the Legacies. It may be true that, when *Holder* took a Transfer of that Mortgage, he made 'inquiry [*368] whether the Legacies were paid, and was misinformed by *Elizabeth Rogers* and *Thomas Rogers*. It is recited, in the Release of 1817, that *Baker* had called in his Money, and that Application was made, to *Holder*, to advance that Sum and also a further Sum; and he takes a Conveyance, by one Deed and by one granting part, in which *Baker* conveys, and *Elizabeth* and *Thomas Rogers* release and confirm: and therefore, the Estate passed to him subject to the Legacies; for, on the face of his Conveyance, it appears that he took the same Estate as *Baker* had (*b*).

RATTENBURY v. FENTON.

1833: 21st Nov.—Practice.—Commission to examine Witnesses.—New orders.

Plaintiff obtained an Order for a Commission, but did not take it out: Held that, under the 17th Order of 1831, the Defendant was entitled to take out a Commission.

THE Plaintiff filed a Replication on the 11th of July, and, on the following day, obtained an order for a Commission to examine Witnesses, but did not take it out. On the 7th of November, the Plaintiff entered a Rule to produce Witnesses, and, on the 18th, he entered the Rule to pass Publication. The Defendant had Witnesses to examine in the Country; and, by the Rule given by the Plaintiff on the 18th, Publication would pass on the 25th, unless the Defendant enlarged it by suing out a Commission under the 17th Order of 1831.

Sir *E. Sugden*, for the Defendant, now moved for a Commission.

The *Vice-Chancellor* held the Case to be within the 17th Order and granted the Motion.

(*b*) See *Watkins v. Cheek*, 2 Sim. & Stu. 199; and *Johnson v. Kennett*, post.

*ASHTON v. MILNE.

[*369]

1833: 24th Nov. and 3d Dec.—Mortgage.—Redemption.—Length of Time.

A. and *B.* being seised in Fee, in right of their Wives, of Two undivided Fourth Parts of an Estate, subject to a Mortgage term, joined, in 1784, with the Owner of the other Moiety, in conveying the Estate, by Lease and Release, but without a Fine, to a Purchaser in Fee and the Mortgage was paid off, and the Term assigned to attend. The Purchaser, and those

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claiming under him, had been in possession from the date of the Conveyance. *A.*'s Wife survived him, and died in 1825, leaving one of the Plaintiffs her Heir. *B.*'s Wife died in 1818, leaving the other Plaintiff her Heir. *B.* died in 1826. In 1830 the Plaintiffs brought an Ejectment, but were nonsuited by the Defendants setting up the Term. In 1831 they filed a Bill to redeem, which was dismissed, on account of the length of possession by the Defendants and those under whom they claimed.

IN 1783, *Betty Penn* and *James Eyre* were seised in Fee, as Tenants in Common, of equal Moieties of an Estate in *Lancashire*, subject to a Term of 1,000 years, which, in 1754, became vested in *Sarah Bellamy*, for securing 500*l.* and Interest.

Betty Penn died in 1783, leaving her Daughters, *Hannah*, the Wife of *James Ashton*, and *Frances*, the Wife of *Samuel Ashton*, her Co-heirs.

By Indentures of Lease and Release, dated the 22d and 23d of January 1784, *James Eyre*, *James Ashton*, and *Hannah*, his Wife, and *Samuel Ashton* and *Frances*, his Wife, in consideration of 960*l.*, conveyed the Estate, to *John Milne*, the Grandfather of the Defendants, in Fee; and *Sarah Bellamy*, having received her Principal and Interest out of the Purchase-money, assigned the Term to *Henry Bamford*, in Trust, for *Milne*, his Heirs and Assigns, and to attend the Inheritance. The Release contained a Covenant, on the part of *James Ashton* and *Hannah* his Wife, and *Samuel Ashton* and *Frances* his Wife, to levy a Fine of the Estate to *Milne* in Fee: "it did not, however, appear that the Fine was ever levied; but *James* and *Samuel Ashton* executed to *Milne* a Bond dated the 23d of January 1784, for indemnifying him against any Claim to be made, upon the Estate, by their respective Wives, in respect of Dower or otherwise.

Milne and those claiming under him, had been in possession of the Estate ever since the execution of the Release. He died in 1802, intestate, leaving *Edmund Milne* his eldest Son and Heir-at-law. In 1803 *Edmund Milne* conveyed the Estate to *John Milne*, the Father of the Defendants, in Fee. In 1819 *John Milne*, the Father, died, having devised the Estate to the Defendants in Fee.

James Ashton died in 1796, leaving his Wife, who afterwards married *Charles Garlick*, surviving. She survived her second Husband and died, intestate, in August 1825, leaving the Plaintiff, *James Ashton*, her eldest Son and Heir. *Frances Ashton* died in September 1818, leaving her Husband, and the Plaintiff, *Samuel Ashton*, her eldest Son and Heir her surviving. *Samuel Ashton*, the Father, died in 1826.

In 1830 the Plaintiffs brought an Ejectment against the Defendants, to recover possession of the Estate. At the Trial, which took place in August 1830, the Defendants set up the Assignment of January 1784; in consequence of which the Plaintiffs were nonsuited.

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Bamford, having died intestate, and no person having taken out Administration to him, the Plaintiffs applied for Letters of Administration to his Estate in respect of the Term, but without success, owing to the Defendants refusing to produce the Assignment of January [*371] 1784.

The Bill, which was filed in January 1831, charged the Defendants, *James* and *John Milne*, with acting in concert with the other Defendant, *Abraham Milne*, the Personal Representative of *John Milne*, the Grandfather, and that the two first-named Defendants were entitled to an undivided Moiety only of the Estate; for that *Frances Ashton* and *Hannah Garlick* did not levy any Fine of the Estate, or do any act to pass their Interest therein during their Covertures; that *Frances Ashton* died in her Husband's Lifetime, and that *Hannah Garlick* did not, during the interval between her two Marriages, nor after the Death of her second Husband, make any Conveyance or Assurance of the Estate to the Defendants, *James* and *John Milne*, or to any Person under whom they claimed; that the Conveyance of January 1784, was made when *Frances* and *Hannah Ashton* were under Coverture; that, as to the Moiety of the Estate claimed by the Plaintiffs, the possession of the Defendants, *James* and *John Milne*, and those under whom they claimed, was lawful as to one-half of such Moiety, up to the Death of *Samuel Ashton* in May 1826; and that, although such Possession, as to the other half of such Moiety, ceased to be lawful on the Death of *James Ashton* the Elder, in September 1796, yet, inasmuch as the Possession by *John Milne* the Grandfather, was originally lawful, there was not any actual Disseisin, by him or those claiming under him, of *Hannah Garlick's* half of such Moiety.

The Bill prayed that an Account might be taken of what, if anything, was due upon the Security of the Mortgaged *Premises, [*372] to the Estate of *John Milne*, the Grandfather, the Plaintiffs being ready to pay one Moiety of what should be found due; that an Account might be taken of the Rents of the Estate received by *John Milne*, the Grandfather, and that the same might be answered out of his Estate possessed by *Abraham Milne*; that the Estate might be divided between the Plaintiffs and the Defendants, *James* and *John Milne*, and that a Writ of Partition might issue for that purpose; that *Abraham Milne* might assign to the Plaintiffs, or as they should direct, one Moiety of the Estate, for the residue of the term of 1,000 years, and that the Defendants, *James* and *John Milne*, might be decreed to deliver up to the Plaintiffs the Possession of such Moiety, and that the Title Deeds might be secured for the benefit of the Parties entitled thereto: or, in case the Court should be of opinion that the Plaintiffs ought to bring an Ejectment to recover Possession of their Moiety

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of the Estate, then that the Defendants might be restrained from setting up the term of 1,000 years, or any other outstanding Term, so as to prevent a fair trial of the Ejectment; and that an Account might be taken of the Rents received by the Defendants, *James* and *John Milne*, and that they might pay one Moiety thereof to the Plaintiffs.

The Defendants, *James* and *John Milne*, by their Answer submitted that a good and indefeasible Title to a Moiety of the Estate was acquired by them from *James Eyre*, and that, if *James Ashton* the Elder and *Samuel Ashton* the Elder were seised of the other Moiety in the Right of their Wives, the Conveyance of 1784 passed a Fee voidable by Entry, and that the same, together with the subsequent Entry of *John Milne* the Grandfather, operated as an actual Disseisin as to that Moiety, or [*373] *that the subsequent Entries of the Parties claiming under him, operated in that manner. And the Defendants insisted on the Indentures of January 1784, and also upon the Statute of Limitations and the length of time which had elapsed since January 1784, and also since the alleged Title of the Plaintiffs was supposed to have accrued, in Bar to the Bill and the relief thereby sought, as far as they were respectively applicable thereto, and in the same manner as if they had pleaded or demurred to the Bill; and they submitted that, if either of the Plaintiffs was entitled to any Share of the Estate, the Defendants were entitled to a Lien for a like Share of the Mortgage sum of 500*l.* and the Interest thereof.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiffs:

The Possession of the Defendants was originally lawful; and, therefore, they never can say that they are Disseisors. The question is, what Estate passed by the Conveyance of 1784? As no Fine was levied, the Husbands conveyed only their Interest in their Marital Right and as Tenants by the Curtesy. The Persons who acquired the Interest of the Husbands, stood in their situation, and were bound to keep down the Interest of the Money due on the Mortgage. *Corbett v. Barker* (a). *Samuel Ashton*, who was Tenant by the Curtesy of one Fourth of the Estate, did not die till 1826; and, therefore, the Title of the Plaintiffs to that portion of the Estate, did not commence till that time. Besides, there was a Tenancy in Common; and the possession of one Tenant in Common, can never be adverse [*374] to the other Tenant in Common; for the possession of the "one, is the possession of the other. *Reading v. Royston* (b). On the trial of the Ejectment, the Defendants did not rely on Adverse Possession, but on the Term.

Mr. *Pepys* and Mr. *Walker*, for the Defendants:

(a) 1 Anst. 138; and 2 Anst. 759.

(b) Salk 242.

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James Ashton died in 1796; and *Hannah Ashton* being then discoverte, her Title to one Fourth of the Estate accrued. It is true that she married again; but that is immaterial; for the time had begun to run against her; so that the Defendants and those under whom they claim, have been holding adversely to *Hannah* and those who claim under her, ever since 1796. And, if there is a good Defence against one Co-Plaintiff, there is an end of the question. If the Plaintiff who claims through *Hannah*, is not entitled to relief, the other Co-Plaintiff cannot have any relief. *Doe v. Prosser* (c).

The relief which the Plaintiffs ask, is, first, to redeem, and, next, to prevent the setting up of the Term. The Court will not allow of Redemption, unless a clear Title to redeem be shown. The time that has elapsed, is a bar to both species of relief. If *John Milne* the Grandfather was Tenant by Sufferance, it is quite clear that, on his death in 1802, his Heir acquired an Estate in Fee by Disseisin: and, if the Possession became adverse in 1802, the Plaintiffs, or those under whom they claim, ought to have perfected their Claim in or before 1822. But we go further and say that a Conveyance by a Husband and Wife seised in right of the Wife, passes a Fee defeasible by the Entry of the Wife. Before the Statute 32 Hen. 8 c. 28, such a Conveyance would have worked a Discontinuance. [*375] That Statute converted the right of Action into a right of Entry.

[The VICE CHANCELLOR:—Have you any authority for what you stated? it is new to me.]

A Lease, by a Husband, of his Wife's Lands extending beyond his Life, is voidable by the Wife after his death, but not void. *Doe v. Weller* (d).

Hannah Ashton became discoverte in 1796: there has been, therefore, a clear Adverse Possession and receipt of the Rents of her share of the Estate, ever since that time. A party who is under disability at the time when the right to redeem accrues, must enforce that right within 10 years after the disability has ceased. The Plaintiff, therefore, who claims under *Hannah*, is clearly barred by length of time, and, if one of the Co-Plaintiffs cannot succeed, the other must fail. *Belch v. Harvey* (e), *Cholmondeley v. Clinton* (f), *Cuthbert v. Creasy* (g). If the Plaintiffs are not entitled to redeem, they cannot prevent the setting up of the Term.

Sir *E. Sugden*, in reply:

In 1784, the *Ashtons* were seised in Fee, as Coparceners, of one undivided Moiety of the Estate, and there was an existing Mortgage for 1,000 years. The persons under whom the Defendants claim, then purchased; and the Term was assigned to a Trustee, in trust to attend the Inheritance. The Husbands professed to convey the Fee: but an [* 376]

(c) 1 Cowp. 217.
Appendix, No. 15.

(d) 7 T. R. 478.
(f) 4 Bligh, 1.

(e) 3 P. W. 287, note; and Sugd. Vend.
(g) Ibid. 125, note.

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innocent Conveyance by Husband and Wife seised in right of the Wife, will not pass a voidable Fee, but only the interest of the Husband in his Marital Right and as tenant by the Curtesy. A Lease may be a beneficial contract for the Wife; and, therefore, she may accept it or not, as she pleases. The Husbands were bound to keep down the Interest on the Mortgage, and might have come, at any time, to redeem. *Milne*, the purchaser, when he entered, stood in the situation of the Husbands, and was bound to do the same; consequently, the right to redeem was kept open down to the death of *Samuel Ashton*. The very point was decided in *Corbett v. Barker*.

As to there having been Adverse Possession from 1796; how can the Statute of Limitations run, where an undivided share is conveyed? The rule of Law is that the right of one Co Heir, will save the right of the other Co Heir. There can be no Disseisin of one undivided Fourth part, whilst the right to the other undivided Fourth, exists. How can it be said, with reference to the Term, that *Samuel Ashton* was entitled to redeem; but that, as to *James Ashton*, the right was gone? The right cannot be lost as to one, whilst it remains as to the other.

We have made out a Title to redeem as to a Moiety of the Estate, or, at all events, as to a Fourth part of it. The rule is that a Stranger and another Party or Parties, who have conflicting claims, cannot be joined as Co-Plaintiffs (*h*). This Case does not fall within that Rule, [*377] *even if one only of the Co-Plaintiffs shall be held entitled to redeem. *Price v. Copner* (*i*).

The VICE-CHANCELLOR:

In this Case *James Ashton* and his Wife were seised in Fee, in her right, of an undivided Moiety of a certain Estate, and *Samuel Ashton* and his Wife, in her right, were seised of another undivided Fourth part; and *James Eyre* was the owner of the other Moiety; and the Entirety was subject to a Mortgage Term of 1,000 years.

By Indentures of Lease and Release of 1784, all these Parties professed to convey the Estate to *John Milne*, for valuable consideration. It appears that they were imperfectly skilled in Conveyancing; for a Bond was taken to indemnify the Purchaser against the Dower and other rights of the Married Woman. The Term of 1,000 years also was assigned to a Trustee to attend the Inheritance: but this is not material to the question now before me. The Title is deduced from *John Mylne* to the Defendants; but nothing turns on the mode in which that has been done. *James Ashton* died in the

(*h*) See *Cholmondeley v. Clinton*, *ubi supra*; *The King of Spain v. Machado*, 4 Russ. 225; and *Delondre v. Shaw*, *ante*, Vol. II. p. 237.

(*i*) 1 Sim. & Sta. 347.

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month of September 1796; his Wife survived him, and married again. She survived her second Husband and died in 1825, and *James Ashton*, one of the Plaintiffs, is her Son. *Frances*, the Wife of *Samuel Ashton*, died in 1818, and her Husband died in 1826. *Samuel Ashton*, the other Plaintiff, is her Son. The Plaintiffs found their right to the relief sought by the Bill, on the alleged novel accruer of their Title: but they are not entitled to any relief, unless they are entitled to redeem the Mortgage Term: and, the question is whether, because their Title has accrued within 20 years, they have a right to that relief against the Defendants, whose Title is founded on undisturbed possession since 1784.

It is a settled Rule that a Court of Equity regards more the antiquity of possession by the Defendant, than the novel accruer of Title to the Plaintiff; and that it will not interfere against a person who, claiming by a Mortgage Title, has been in possession more than 20 years without having recognised the right to redeem. This Rule is, in a great degree, established by *Cholmondeley v. Clinton* and the Cases which are reported, by Mr. *Bligh*, to have been cited on the Appeal to the House of Lords.

The Case of *Price v. Copner* has been cited as infringing the rule. But that Case seems to me to afford the strongest evidence of the Rule: for, by the Decree on the hearing, it was referred to the Master to inquire whether the Defendants or those under whom they claimed, had, in any way, treated their Title as a Mortgage Title, at any time within 20 years before the filing of the Bill (k). It is clear that the reference could only have been made in order to ascertain whether the Defendants had placed themselves without the benefits of the Rule. That Case, therefore, is a confirmation of the Rule. What afterwards occurred on the Exceptions is immaterial.

The same Volume which contains the Report of *Price v. Copner*, contains also a Report of *Harrison v. Hollins* (l). It appears, by my note of that Case, which is referred to in the Report of *Price v. Copner*, that Sir *Wm. Grant*, in his Judgment, cited a Case of *Dallas v. Floyd*, which was heard in 1739. There a Tenant for Life of an Equity of Redemption, permitted the Mortgagee to enter into possession. The Tenant for Life died in 1721, and, in 1737, which was more than 20 years after the Mortgagee's entry into possession, the Remainder Man filed his Bill to redeem; and it was dismissed with Costs. Therefore this Rule has prevailed, uniformly, except in the Case of *Corbett v. Barker*.

In that Case there was a Decision by *Eyre*, Chief Baron, and a renewal of that Decision by *Macdonald*, Chief Baron. There is great force in the Argument of Sir *Samuel Romilly*; and I cannot but think that the better decision was reversed. I am not, however, left to choose between the con-

(k) 1 Sim. & Sta. 347.

(l) Ibid. 471.

1834.—*Bates v. Bonnor.*

afflicting Decisions of those Learned Judges, because I take the Rule to be established: and I am of opinion that this Bill must be dismissed with Costs.

GOODALL *v.* PICKFORD.

1833: 11th Dec.—*Practice.—Opening.—Biddings.*

A Motion to open Biddings for several Lots purchased by different Purchasers, on an advance of a certain Sum for each Lot, is irregular.

Mr. STINTON moved to open the Biddings for eleven Lots, purchased by different Purchasers, on an advance of a certain Sum for each Lot. He cited *Watts v. Martin* (a). Mr. Wakefield, Mr. Jacob, Mr. Kindersley, Mr. Gridlestone, jun. and Mr. Gordon opposed the Motion, on the ground that a separate Motion ought to have been made as to each Lot.

[*380] *The Vice-Chancellor expressed his disapprobation of the Case cited, and held the objection valid.

Motion refused with Costs.

BATES *v.* BONNOR*.

1834: 3d May.—*Practice.—Opening.—Biddings.*

An Estate was put up to sale in four Lots, and the Timber on each Lot was to be paid for by the Purchaser, according to a Valuation which had been made. A. purchased Lot 1; the other Lots were not sold. B. opened the Biddings, and, on the resale, purchased Lots 1 and 2, for 2,140*l.*, and Lot 3, at 380*l.* The Court refused to open the Biddings for Lots 1 and 2, on the application of A., unless he would advance 10 per cent. on the price of the Timber as well as the Land, and would take Lot 3 (in case B. should retire from it), at the price it had been sold for, in case it should not fetch the same price at the re-sale.

THIS was a Creditor's Suit.

Under the Decree, the Debtor's Estates were put up to Auction in four Lots; and, by the Conditions of Sale, the Timber on each Lot was to be paid for, by the Purchasers, according to a Valuation previously made.

None of the Lotswas sold, except the first: which was purchased by Bates for 1,500*l.* The Biddings were afterwards opened by Bonnor; and the Estates were again put up to Auction. Bonnor purchased Lots 1 and 2 at Sums amounting to 2,140*l.*, and Lot 3, at 380*l.* The valuation of the Timber on the two first Lots, was 1,193*l.*

(a) 4 Bro. C. C. 113.

* *Ex relatione.*

1834.—Bates v. Bonnor.

Bates now moved to open the Biddings for those two Lots, on an advance of 210*l.*, being nearly 10 per cent. on the price of Lots without the Timber.

**Mr. Knight* and *Mr. Walcott*, in support of the Motion. [*381]

Sir E. Sugden, for *Bonnor*, said that the Biddings ought not to be opened except upon an advance of 10 per cent. at the least, upon the aggregate Sum for which the Lots and the Timber thereon had been sold: that, as *Bonnor* stated, in his Affidavit, that he bid for Lot 3 because he had purchased the other two Lots, he would be entitled to be discharged as to that Lot, in case the Biddings should be opened as to the others: *Price v. Price* (a); and, consequently, that *Bates* ought to provide against any Loss that might arise on the re-sale of Lot 3.

Mr. Knight, in reply, said that the land being the sole object of competition at the Sale, the advance ought to be calculated only on the Sum for which it was sold: that, in *Price v. Price* and *Fielder v. Fielder* (b), the Order went no further than to discharge the Purchaser as to the subsequent Lots.

The VICE CHANCELLOR:

I think that the advance should be on the Price of the Timber as well as the Land; and, in order to protect the Estate from the possibility of Loss if *Mr. Bonnor* should retire from Lot 3, as he is at Liberty to do, *Mr. Bates* ought to take it at 280*l.*, the Sum at which it is now sold, in case that Sum should not be offered for it at the re-sale. If he will agree to this, and will increase his offer to 333*l.* that is, 10 per cent. on the aggregate Sum for which the Land and Timber *comprised in Lots 1 and [*382] 2, are now sold, I think that the Biddings ought to be opened on his paying *Mr. Bonnor* all costs incurred by him in consequence of his having purchased the Three Lots, and opened the Biddings as to Lot 1.

Bonnor having consented to offer the Sum required, the following Order was drawn up: "Whereupon, &c. the Plaintiff, *T. Bates*, by his Counsel offering to advance the Sum of 333*l.* on the Biddings for those parts of the Estates in question in this Cause which are comprised in Lots 1 and 2, and of which the Defendant *J. Bonnor* has been reported the best Purchaser, and upon the said Plaintiff *T. Bates* paying to the said Defendant *John Bonnor* the Costs, Charges and Expenses he hath paid and been put to by reason of his Bidding for and being reported the Purchaser of the Premises comprised in the said Lots 1, 2 and 3, including therein the Costs, Charges and Expenses paid and incurred by him upon his opening the Biddings for Lot 1, to be taxed &c.: this Court doth order that it be referred back to the said *Master* to allow of a better Purchaser of the said Estate and Premises comprised in the said Lots Nos. 1 and 2: and it is ordered that the Person or Persons who shall be allowed the best Bidder or Bidders,

(a) 1 Sim. & Stu. 386.

(b) Ibid.

1833.—Jeyes v. Foreman.

other than the said Plaintiff *T. Bates*, do, within 10 days, make a deposit, after the rate of 10*l.* per cent., on their respective Biddings, the Sum to be ascertained by the said *Master*, and pay the same into the Bank, &c.; and, in default of making such deposit or deposits by the time aforesaid, it is ordered that the said respective Biddings be considered as void, and that the said *Master* without further Motion, re-sell the said Estates: And [*383] it is ordered that the Defendant, *J. Bonnor*, do relinquish and give up the Estates and Premises comprised in Lot No. 3, of which the said Defendant *John Bonnor* has been reported the best Purchaser: And it is ordered that it be referred to the said *Master* to allow of a better Purchaser of the said Estates and Premises comprised in the said Lot No. 3: And it is ordered that the Person or Persons who shall be allowed the best Bidder or Bidders for the said Lot No. 3, other than the said Plaintiff *T. Bates*, if he should become the Purchaser thereof as hereinafter mentioned, do within 10 days, make a deposit, &c. and pay the same into the Bank, &c.: and, in default of making such deposit by the time aforesaid, it is ordered that the said Biddings be considered as void, and that the said *Master* do, without further Motion, re-sell the said Estate and Premises comprised in the said Lot No. 3: And in case, at such resale of the said Estate and Premises comprised in the said Lot No. 3, the Biddings for the same shall not exceed the sum of 380*l.* and the Sum of 60*l.* 14*s.* 8*d.* for the Timber thereon, being the Price at which the said Defendant *John Bonnor* stands reported the Purchaser, it is ordered that the said Plaintiff *T. Bates* be considered as the Purchaser of the Estates and Premises comprised in the said Lot No. 3, at the said Sum of 380*l.* and the Sum of 60*l.* 14*s.* 8*d.* for the Timber thereon: And it is ordered that the Sum of 200*l.* paid into the Bank to the credit of this Cause, by the said Defendant *John Bonnor*, upon his opening for the Biddings the Lot 1 in pursuance of the Order made in this cause on the 25th day of November last, and now remaining on the credit of this Cause, be repaid to the said Defendant *J. Bonnor*; and, for the purposes aforesaid, the said Accountant-general is to draw on the Bank, &c.

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*JEYES v. FOREMAN.

1833: 16th Dec.—Practice.—Defendant.

An attachment issued against a Defendant before the making of a Motion by him, but after service of the Notice of Motion, will not prevent the Motion being made.

SIR E. SUGDEN and Mr. *Girdlestone*, jun., for the Defendant, Mrs. *Lloyd*, moved to discharge an Injunction, for irregularity.

 1833.—*Johnson v. Kennett.*

Mr. *Knight* and Mr. *Bethell*, for the Plaintiff, said that Mrs. *Lloyd* was in Contempt, and, therefore, was not entitled to move, except for the purpose of discharging the Process of Contempt.

Sir *E. Sugden*, in reply, said that the Attachment was issued after the Notice of Motion was served, and, therefore, the Motion ought to proceed.

And The *Vice-Chancellor* so ruled.

 JOHNSON v. KENNETT.

1833: 10th Dec.—*Purchaser.*

A Purchaser from a Devisee, subject to Debts and Legacies, is bound to see his Money applied in payment of the Legacies, if the circumstances of the Transaction afford Evidence that the Debts have been paid, and that the Devisee is dealing with the Estate as Owner.

WILLIAM KENNETT, by his Will dated in 1808, gave to his Wife an Annuity of 50*l.*, for her Life, and a Legacy of 1000*l.* to each of his three Daughters, to be paid to them at 21 or marriage, with Interest in the meantime for their Maintenance and Education; and, subject thereto, and to the Payment of his Debts, Funeral and Testamentary Expenses, he gave all his Real and Personal Estate to his Son, *Thomas Kennett*, his

*Heirs, Executors, Administrators and Assigns and appointed [*385] him his Executor.

The Testator died in May 1809, leaving *Thomas Kennett*, his only Son and Heir, and his Widow and three Daughters him surviving. *Thomas Kennett* proved the Will, possessed himself of the Personal Estate, and entered into the possession of the Real Estate.

By Lease and Release, dated the 14th and 15th of January 1810, and by Fine, he and his Wife conveyed the Estates to uses to bar Dower, and, in the course of the same and the two following years, he sold, appointed and conveyed the Estates, in Lots, to different Purchasers, but did not pay or make any provision for the Annuity or Legacies. Some of the Purchase Deeds recited the Will (omitting the charge of Debts), the conveyance to uses to bar Dower, and that *Kennett* had agreed to give Bonds, to the Purchasers, to indemnify them against the Legacies. To some of these Deeds the Widow was a Party, and released her Annuity as to the Hereditaments therein comprised. The rest of the Purchase Deeds merely recited the Will and the conveyance to uses to bar Dower. *Kennett* gave Bonds to all the Purchasers, The Bonds that accompanied the First Class of Deeds, contained the same recitals as those Deeds, and were conditioned for indemnifying the Obligees against the Legacies. The other Bonds did not notice

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the Will, and were conditioned, merely, for quiet enjoyment, free from all Incumbrances, except the Rents and Services due to the Lord of the Fee.

In 1823 *Thomas Kennett* conveyed and assigned all his Real and Personal Estate, to a Trustee for his Creditors.

[*386] *The Bill was filed by the Testator's Daughters, two of whom were still Infants, against *Thomas Kennett*, the Trustee, for the Creditors, the Purchasers of the Estates, and the Widow, stating that *Thomas Kennett* had proved the Will and possessed the Personal Estate, and, thereout, paid the Funeral and Testamentary Expenses and Debts, and applied the Residue to his own use; that the Purchasers completed their Purchases without inquiring whether the Annuity and Legacies had been properly secured, or in anywise requiring that the same should be so secured: that they had notice that the Annuity and Legacies were well charged on the Real Estates, and that the same had not been secured to be paid by *Thomas Kennett*, so as to exonerate the Real Estates from the payment thereof; and that they took Indemnities, from *Thomas Kennett*, against the Annuity and Legacies. The Bill prayed that the Will might be established, that the Annuity and the Legacies might be declared to be well charged upon the Real Estates, and that the Purchasers might be decreed to contribute, in proportion to the amount of their respective Purchases, towards the payment of the Legacies and the providing of a Fund for payment of the Annuity; or that the Real Estates might be sold for those purposes.

The Purchasers, in their answer, said they could not set forth whether *Thomas Kennett* had or had not paid the Testator's Debts and Funeral and Testamentary Expenses out of the Personal Estate and applied the Residue to his own use; they admitted that they never inquired whether the Annuity and Legacies had been properly secured, or required, before they completed their Purchases, that the same should be so secured: and

[*387] they submitted that they were not bound to see to the application, nor were answerable or accountable for the misapplication or non-application of their respective Purchase Monies: and they admitted that, at the time of their respective purchases, they had, by the Will, but not otherwise, notice, and they believed that the Annuity and Legacies were well charged on the Real Estates, and that the same had not been, in any way, secured to be paid by *Thomas Kennett*.

Sir *E. Sugden* and Mr. *Roupell*, for the Plaintiffs:

First: With respect to the Purchasers who took the Special Bonds. A Devise of an Estate subject to Legacies, is, in fact, a Trustee; and whenever the Court sees Parties dealing with the Devisee, not in his character of Trustee, but as owner of the Estate, it will follow the Land. *Watkins v.*

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Cheek (a). *T. Kennett*, by conveying the Estates to uses to bar Dower, assumed the character of owner. No Fine was necessary if he sold under the Will; for there could have been no claim of Dower if he sold as Trustee. The Purchasers took Bonds of Indemnity against the Legacies; and, in their Answer, they state their belief that the Legacies had not been secured to be paid by *T. Kennett*.

Mr. *Pepys* and Mr. *Wray*, for the Purchasers:

The Purchasers are protected by the charge of Debts. *T. Kennett* was the owner of the Estate, subject to the charges. He had a right to deal with it; and he has dealt with it so as to make a different mode of Conveyance necessary. How does that circumstance show that he did not intend to sell for payment of the Debts? The [*388] Purchasers state, in their Answer, that they cannot set forth whether or not the Debts have been paid.

[The VICE-CHANCELLOR:—There is an admission that they knew the Legacies were unpaid, but there is no statement that they knew the Debts were paid.]

There is an absence of all proof as to the Debts. Is the circumstance of the Devisee having changed the nature of his Estate, to deprive the Purchasers of the protection of the charge of Debts? Whatever a Devisee may do with his Estate, his duty to Parties who have a prior claim, cannot be altered. *Watkins v. Cheek* decides, merely, that, where a Party lends himself to a Breach of Trust for his own benefit, he shall be liable. Here the Purchasers had no knowledge of any Breach of Trust, or of any intention to commit a Breach of Trust. The Bonds assume that the Party who received the Money, was to pay the Legacies: they were taken by the Purchasers *ex abundanti cautela*.

The VICE-CHANCELLOR:

I do not understand that the Record is so framed as to raise the issue whether the Debts were paid at the time when the Estates were conveyed to the Purchasers (*b*). But, if the issue had been raised, I am of opinion that the form of the Conveyances and the Bonds, would be receivable, as between the Purchasers and the Plaintiffs, to show that, at the time of the Conveyances, the Debts were paid. If the Debts were not paid, it was unnecessary for the Purchasers to resort to the machine- [*389] ry which they have adopted. The form of the Bonds of Indemnity shows that the Parties did not think it necessary to advert to the Debts at all. Those Bonds do not notice the charge of Debts, but they recite the Will as if there was no charge of Debts in it. Therefore, they afford evidence that the Debts were paid: and, as between the Purchasers and *Ken-*

(a) 2 Sim. & Stu. 199.

(b) The Bill alleged that *T. Kennett* paid the Debts out of the Personal Estate.

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nett, I must take it as a transaction in which the Purchasers were advised to take the Bonds as an additional security.

Independently of that, it appears, on the face of the transaction, that the Purchasers were dealing with *Kennett* as owner of the Estate subject to the Legacies, and not as a Person to whom the Estates had been devised subject to the general charge for Payment of Debts and Legacies.

From the form of the Conveyances and of the Bonds of Indemnity, I am of opinion that the Estates of the Purchasers must be taken as subject to the Legacies.

Sir *E. Sugden* and Mr. *R. Roupell*, with respect to the Purchasers who took the General Bonds, contended that the same principle applied to them, as to other Purchasers.

Mr. *Pepys* and Mr. *Wray* said that the Bonds for quiet enjoyment free from all Incumbrances, were taken merely as an additional security to the Covenants for the same purpose, and that, as the taking of the Covenants afforded no evidence of an intention to commit a Fraud [*390] *or a Breach of Trust, so neither did the taking of the Bonds.

The VICE-CHANCELLOR :

The question is, in what character the Vendor was placed.

All the Deeds recite the Will, and also take notice of the Conveyance and Fine of January 1810: that circumstance shows that *Kennett* was dealing, not as Devisee subject to the general charge of Debts and Legacies, but as owner of the Property.

The Will, as recited in the Conveyances, notices the charge of Legacies; and those Conveyances were accompanied by General Bonds. The Bonds could have been given for no other purpose than to protect the Purchasers from the Legacies.

The Decree, as drawn up, referred it to the *Master* to take an account of the Testator's Personal Estate, not specifically bequeathed, come to the hands of *Thomas Kennett*, and also of the Debts, Funeral Expenses and Legacies and Annuities of the Testator, and directed that the Personal Estate should be applied in payment of the Debts and Funeral Expenses, in a course of administration, and then in payment of what remained due on account of the Legacies and Annuities, and, in case the Personal Estate should not be sufficient for the payment of what was due for such Debts, Funeral Expenses and Legacies and Annuities, it was declared that the Real Estates comprised in the Will were well charged with the Debts, and with

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the Legacies and Annuity given thereby, and that the same, in the hands of the Defendants claiming as Purchasers from *Thomas Kennett*, were then liable to raise and pay what remained due in respect thereof, or so much as the Personal Estate should be insufficient to pay.* [* 391]

GRAVES v. HICKS.

1833: 9th December.—Will.—Construction.—Tenant for Life.—Priority.—Cumulative Legacies.

Testator, by his Will, gave an Annuity to his Daughter, out of certain Estates, for her separate use. By a Codicil, he gave her a Life Estate, for her separate use, in the same Estates. Held that the Daughter was entitled to the Life Estate only.

Testator charged his Estates with an Annuity in favour of his Wife, and, *subject thereto*, he devised the Estates in strict settlement. Afterwards, by his Will and Codicils, he charged the Estates with several other Annuities to his Wife and other persons. Held that the first-mentioned Annuity was the primary charge on the Estates.

Testator devised an Estate to his Daughter for Life, with Remainder to her Husband for Life, and charged other Estates with the payment of an Annuity to his Daughter, and, after her death, with the payment of an Annuity to her Husband. He then made a Codicil which, in effect, revoked the Husband's Life Estate in Remainder. By a subsequent Codicil, he gave to the Husband, a Life Estate in possession in the first Estate, and also an Annuity in possession, to the same amount and charged upon the same Estates as the former Annuity. Held that the second Annuity was substituted for the first.

JOHN HICKS, by his Will dated the 4th of May 1821, gave his Copyhold Messuage, &c., called *Plomer Hill House*, in the County of *Bucks*, unto and to the use of Trustees and their Heirs, in Trust for his Wife, for her life or widowhood, or until she should cease to reside [* 392] therein, and, on her death, second Marriage, or ceasing to reside on the Premises, the Testator directed his Trustees to stand seised thereof upon the Trusts after declared of the Residue of his Real Estates: and he gave to the same Trustees and their Heirs, during the Lives of his Niece *Frances Mountstevens*, and his Daughter *Anna Maria Hearle*, and the Life of the Survivor of them, his Freehold Estate called *Treravel* in *Cornwall*, in Trust to pay an Annuity of 20*l.* for the separate use of his Niece, for her Life, and to dispose of the residue of the Rents for the separate use of his Daughter, and, after the death of his Daughter, but subject to the Annuity of 20*l.*, he gave the Estate to her Children, as Tenants in Common in Tail, with Cross Remainders amongst them in Tail, with Remainder to the

* This Decree was reversed by Lord *Lyndhurst*, C.; but, as the *Vice-Chancellor's* decision is stated as an authority, in *Sir E. Sugden's Treat. on Vendors*, Vol. II. p. 39. it was deemed advisable to report the Case.

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Uses after declared of the Residue of his Real Estates: and he gave his Manor of *Bradenham* in the County of *Bucks*, and all the residue of his Real Estates, subject nevertheless to such charges and Incumbrances as should, at the time of his decease, be existing and charged thereon or any part thereof under or by virtue of any Marriage Settlement or otherwise, to the same Trustees and their Heirs, to the use that his Wife might, during her widowhood, receive thereout an Annuity of 300*l.* a year, and, *subject thereto*, to the use of his Son for Life, with Remainders to his first and other Sons, successively, in Tail Male, with Remainder to the intent that the Testator's Wife might receive, during her Life or widowhood, a further Annuity of 100*l.*, and that the Trustees might, during the term of 99 Years, if his Daughter should so long live, *take a like Annuity of 100*l.* in Trust for the separate use of his Daughter*, with Remainder to his Grandson, *John Graves*, for his Life, with Remainders to the first and other Sons [*393] of *John *Graves*, successively, in Tail Male, with several Remainders over.

The Testator, by his first Codicil, after reciting that his Son had died unmarried and without Issue, since the execution of his Will, gave his *Treravel* Estate, after the Death of his Daughter, to her husband, *Francis Hearle*, for his Life, and, after his Death, to the Uses to which the same stood limited, by his Will, after the Death of his Daughter. And he charged his Manor of *Bradenham* and all his other Residuary Real Estates with the payment of a further Annuity of 100*l.* to his Wife, for her Life or Widowhood, in addition to the Annuities charged thereon, in her favour, by his Will, and which, as well as all the other provisions for her, he thereby ratified and confirmed: and he charged the same Estates with the payment to his Trustees, during the term of 99 years, if his Daughter and her Husband or either of them should so long live (*a*), *of a further Annuity of 200*l.**, upon Trust, during his Daughter's Life, to apply the same for her separate use, in addition to the Annuity of 100*l.* provided for her, by his Will, out of the same Estates, and which he thereby ratified and confirmed: and *he charged the same Estates with the payment, after his Daughter's Death, of an Annuity of 100*l.* to her Husband, Francis Hearle, for his Life*, in addition to the benefits thereby given to him.

The second and third Codicils did not affect the Real Estates.

[*394] *The Fourth Codicil was as follows:—"And I do make and add this further Codicil to my Will, hereby revoking and making null and void *several* of the dispositions heretofore made by me, in my said Will and Codicils, of all my Freehold, Copyhold and Personal Estate and

(*a*) It was contended (but unsuccessfully) that, under the above Clause, Mr. *Hearle* was entitled to an Annuity of 200*l.* after his Wife's death.

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Effects of all and every kind and description ; and, instead and in the place of such Devise, Disposition and Bequests thereof, I do give and bequeath all and every my Freehold, Copyhold and Personal Estate and Effects, of every kind and description whatsoever and wheresoever situated, unto my Daughter, *Anna Maria Hearle*, for her Life, and, from and after the determination of that Estate, I give, devise and bequeath the same unto my Grandson, *John Graves*, and his Heirs, in strict Entail, as in my said Will directed." (The Testator then directed that his Grandson should not be put in possession of his Estates until he should attain the age of 31 Years, and that, in the meantime, the Rents should be accumulated for his benefit.) "And, in failure of Issue of the said *John Graves*, I order that my said Estates and Effects shall go and descend as is by my said Will directed. And I do ratify and confirm the several Annuities and Donations by me, in my said Will and former Codicils, given and bequeathed. And I do further give and bequeath, unto my dear Wife, one other Annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given her by my said Will and Codicils, hereby, in all other respects but what is above mentioned, confirming my said Will and Codicils."

By the Fifth Codicil, the Testator expressed his will and meaning to be that what he had left his Daughter, should be at her own disposal, and independent of her *Husband, and not subject to his [*395] Control, Debts or Creditors, and that any Lease or Appointment which she might make of his Estates, should be valid, and that her Receipt should be a discharge for any Rents or Money paid to her, notwithstanding her coverture. But, to show his regard for her Husband, the Testator left him the Rents and Profits of his Estate of *Treravel* during his Life, (subject, however, to an Annuity of 20*l.* to his Niece, Mrs. *Mountstevens*, for her Life,) and also an Annuity of 100*l.* further, during his Life, out of the *Bradenham* Estates. And he gave and confirmed, to his Wife, all Sums of Money which she or he might be entitled unto out of the Effects of her late Father, or that any other Friend might leave her ; and he ordered his Executors, in case she died before him, to fulfil her will and disposal thereof (b).

On the hearing of Exceptions taken by the Plaintiff, *John Graves*, and also by the Defendant, Mrs. *Hicks*, to the Master's Report of the 21st of June 1833, and on the Cause coming on for further Directions, the following Questions were raised :

(b) See *Doe v. Hicks*, 8 Bing. 475, where the Will and Codicils are more fully stated. The Vice-Chancellor considered that the spirit of the Decision in the House of Lords bound any other Court that had to decide upon any portion of the Testator's Property that was similarly circumstanced to the *Plomer Hill* Estate ; and, therefore, His Honor held that the specific Bequests to Mrs. *Hicks*, in the Will and First and Third Codicils, were not revoked by the Fourth Codicil.

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First, Whether Mrs. *Hearle* was entitled to the Annuities of 100*l.* provided for her by the Will and first Codicil, and also to the Life Estate given to her by the Fourth Codicil :

[*396] *Secondly, Whether the Annuity of 300*l.* given to Mrs. *Hicks* by the Will, was a prior Charge to the several other Annuities given by the Will and Codicils (c) :

And thirdly, Whether the Annuity of 100*l.* given to Mr. *Hearle* by the Fifth Codicil, was in addition to, or in substitution for the Annuity of 100*l.* given to him by the First Codicil.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiff.

Mr. *Pepys*, Mr. *Beames* and Mr. *Patch*, for the Defendant, Mrs. *Hicks*.

Mr. *Knight* and Mr. *Wigram*, for the Defendants, Mr. and Mrs. *Hearle*.

Mr. *Barber* and Mr. *Wright*, for the Trustees.

The VICE-CHANCELLOR :

First: notwithstanding the Testator does, in his Fourth Codicil, ratify and confirm the several Annuities and Donations by him given and bequeathed in his Will and former Codicils, I cannot think that he intended that Mrs. *Hearle* should have the two Annuities which, by the Will and First Codicil, are charged in her favour on the *Bradenham* Estates, and that she should

take a Life Interest also in the same Estates. For though I admit, according to the Case that has been cited (d), that a *Person
[*397] may have a Life Interest and also a Charge on the same Lands, there would be a palpable inconsistency, in substance, (though not in the technical Language used by the Testator,) in giving, to Mrs. *Hearle*, a Life Interest and also an Annuity for her separate use out of the same Estates.

Secondly: The Testator first gives the Annuity of 300*l.* to his Wife, and "subject thereto," he devises the Estates on which it is charged to his Son in strict Settlement, and then he gives other Annuities out of the same Estates: I am, therefore, of opinion, that the Wife's Annuity is a primary charge to all the other Annuities given by the Will and Codicils; but there is no priority between the other Annuities, and they must all be paid *pari passu*.

Thirdly: According to the Decision in the House of Lords, the effect of the Fourth Codicil was to revoke the Life Estate in Remainder which, by the First Codicil, had been given, to Mr. *Hearle*, in the *Treravel* Estate (e). Supposing then that the Testator was aware that, by the Fourth Codicil, he had, of necessity, revoked the Estate for Life in Remainder in the *Treravel* Estate (about which, after what has taken place in the House of Lords, I am not at liberty to say there is any doubt), he may also have supposed that

(c) It was alleged that the Rents of the Estates were insufficient to pay the Annuities in full.

(d) *Forbes v. Moffatt*, 18 Ves. 284.

(e) See 8 Bing. 489.

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the effect of the Fourth Codicil might be to destroy the Annuity which, by the First Codicil, he had given, to Mr. *Hearle*, in Remainder after the death of his Wife (*f*): and it appears to me* that the mode [*398] in which he revived the Estate for Life in the *Treravel* Estate and accelerated it, is only to be attributed to the fact that he intended to undo what he had done by the Fourth Codicil: and the same intention must be taken to have been in his mind when, by the Fifth Codicil, he gives, to Mr. *Hearle*, an Annuity in possession out of the *Bradenham* Estates, he having, by the First Codicil, given Mr. *Hearle*, out of the same Estates, only an Annuity in Remainder after the death of his Wife. Therefore, I am of opinion that the Life Estate in possession in the *Treravel* Estate, and the Annuity in possession out of the *Bradenham* Estates, were given, to Mr. *Hearle*, in lieu of the Life Estate and Annuity in Remainder which were given to him by the First Codicil.

1835: 14th July.—*Mortgage*.—*Exoneration*.

A Father having agreed to secure a Marriage Portion for his Daughter, mortgaged Part of his Estates for that purpose, and covenanted to pay the Money. By his Will, he directed his Debts to be paid first out of the Residue of his Personal Estate, then, out of his Money in the Funds, and, lastly, out of his residuary Real Estates. Held that the mortgaged Estate was not to be exonerated, from the Portion, out of the Personal Estate.

THE Testator, after disposing of his *Bradenham* and other residuary Estates in the manner stated *ante*, page 392, gave, all his Money in the Parliamentary Stocks or Funds of Great Britain, to the Trustees, in Trust for his Wife, during her life or widowhood, and, after her death or second Marriage, in Trust, absolutely, for the Person who, under his Will, should then, either as Tenant for Life or in Tail Male, be in the actual possession of his residuary Real Estates thereinbefore devised, or entitled to the Rents and Profits thereof: and he disposed, in like manner, of the Household Goods, Furniture, Books, Prints, Pictures, China, Glass and Plate, which should belong to him at the time [*399] of his decease: and he gave all the Ready Money, Wines, Provisions, Provender, Live and Dead Stock, which should be in or about his Mansion called *Plomer Hill House* at his decease, and also all the Articles of Plate brought by his Wife, for her own absolute use and benefit: And, as to all the rest and residue of his Personal Estate and Effects not thereinbefore specifically bequeathed, he gave the same, subject and charged with the Payment of all his just Debts, Funeral and Testamentary Expenses and the pecuniary Legacies given by his Will, or which he should give by

(*f*) The Fourth Codicil *ratified and confirmed* the Annuities given by the Will and former Codicils.

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any Codicil thereto, to his Son for his own absolute use and benefit: Provided that, if the residue of his Personal Estate should be insufficient to answer all his said Debts, Funeral and Testamentary Expenses and Legacies, then he charged his Funded Property thereinbefore bequeathed, and, if that should be insufficient, then the residue of his Real Estates thereinbefore devised, with the Deficiency.

By the Order on further Directions of the 9th of December 1833, it was, amongst other things, referred to the *Master* to inquire whether any and which of the Mortgage Debts or other Incumbrances affecting the Testator's Real Estates, constituted a Debt or Debts which, in the first instance, ought to be paid out of the residue of the Testator's Personal Estate, and, if that Fund should be insufficient, then out of his Parliamentary Stocks and Funds: and it was declared that the residue of the Testator's Personal Estate was the primary Fund for the payment of his Debts, Funeral and Testamentary Expenses and Legacies, and that his Parliamentary Stocks and [*400] Funds were the second Fund for the payment thereof, and that the residue thereof, if any, was a charge upon his residuary Real Estates.

On the 6th of March 1835, the *Master* reported that, by an Indenture dated the 31st of January 1807, and made between the Testator of the one part and certain Trustees of the other part, after reciting an intended Marriage between the Testator's eldest Daughter and *Charles Gray Graves*, and that, on the Treaty for the Marriage, the Testator had proposed and agreed to secure, to Trustees, 6,000*l.*, as and for the Marriage Portion of his Daughter, by a Mortgage of the Hereditaments thereafter demised, of which the Testator was seised in Fee-simple in possession free from Incumbrances, to be paid, at the end of 12 Calendar Months next after his death, upon the Trusts of an Indenture of Settlement of even date: It was witnessed that, in pursuance of the said Proposal and Agreement of the Testator, and in consideration of the intended Marriage, and for securing, to the Trustees, the sum of 6,000*l.* with Interest as after mentioned, upon the Trusts of the Settlement, the Testator demised, to the Trustees, the Hereditaments therein described (being part of his residuary Real Estates) for 1,000 years, subject to a Proviso for the Cesser of the term, if the Heirs, Executors or Administrators of the Testator should, within 12 Calendar Months after his death, pay to the Trustees 6,000*l.* with Interest at 5*l.* per Cent. from his Death until payment thereof; and also if the Testator should pay, to the Trustees, Interest, after the like rate, on 4,000*l.*, from the solemnization of the Marriage up to the Day of his Death, upon the Trusts of the Settlement. And the Testator for himself, his Heirs, Executors and Administrators covenanted [*401] with the Trustees for payment of the Principal and Interest

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pursuant to the Proviso, and entered into the other Covenants which are usual Mortgages of the like nature.

The Recitals in the Settlement were to the same effect as those in the Mortgage Deed, and thereby Trusts were declared, of the Principal and Interest secured by that Deed, for the benefit of the Testator's Daughter and her intended Husband, and the Children of the Marriage.

The Marriage was solemnized on the 31st of January 1807. The Plaintiff was the only Issue of the Marriage.

The Master found that the Mortgage Debts created by the Indenture of the 31st of January 1807, ought not, in the first instance, to be paid out of the residue of the Testator's Personal Estate, or, if that Fund should be insufficient, then out of the Testator's Parliamentary Stocks and Funds; but that the *Mortgaged Premises were charged with and subject and liable, in the first instance, to the payment of the 6,000*l.* and Interest.*

The Plaintiff excepted to the Report.

Mr. Kindersley and Mr. Koe, in support of the Exception.

The Testator did not create a Trust-term for raising a Portion for his Daughter, but he mortgaged his Estate to the Trustees, as a security for the Debt: they might have foreclosed the Mortgage; but they had no Power, by reason of any Trust, to raise the 6,000*l.* out of [*402] the Estate. In the Cases in which the Court has said that the Real Estate shall not be exonerated, either there has been no Covenant for payment of the Money, or there has been a Trust created for raising it, or the Party has been settling the whole of his Estate on his Marriage. *Lady Coventry v. Lord Coventry* (a); *Edwards v. Freeman* (b); *Wilson v. Lord Darlington* (c); *Lanoy v. The Duke of Athol* (d).

In *Lechmere v. Charlton* (e), Sir W. Grant says: "It is difficult to conceive how a man can make himself a Debtor (although, by the same Instrument, he charges the Real Estate) without subjecting his Personal Assets, in the first instance, to the payment of the Debt. Here the Settlor, certainly, makes himself a Debtor, by his Covenant." So that, in that Case, though there was a Trust for raising the Money and not a Mortgage, yet Sir W. Grant inclined to think that a debt was created. In *Ex parte Digby* (f), (which is a Case that stands on the same footing as *Lady Coventry v. Lord Coventry*), Lord Eldon says: "In general, if a Tenant for Life with power of charging, makes a charge, his general Personal Estate will not be liable to exonerate the Land; and, in general, if he pays it off, he becomes an Incumbrancer on his own Estate. Thus, if there be Tenant for Life with power of charging, with Remainder to Trustees to preserve

(a) 2 P. W. 222.

(b) 2 P. W. 435

(c) 2 P. W. 664, note.

(d) 2 Atk. 444.

(e) 15 Ves. 193.

(f) Jac. 235.

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Contingent Remainders, with other Remainders over, and the Reversion to himself; if he makes a Mortgage, and afterwards pays it off, he [*403] "is himself an Incumbrancer on the Estate, even without taking an Assignment." Then his Lordship says: "The 5,000*l.* was disposed of; that did not remain as her separate Estate. If it should appear that she had any other separate Estate, the question might be considered. It would depend upon whether the Personal Security was meant to be the primary security, or only collateral." Therefore his Lordship did not decide between the Duchess's Real Estate and her separate Personal Estate.

In every Case, where there has been a Mortgage redeemable by the Mortgagor and a Covenant by him to pay the Money, his Personal Estate has been held liable to exonerate the land.

Notwithstanding the Testator devised his residuary Real Estates subject, expressly, to such Charges and Incumbrances as, at the time of his Decease, should be existing and charged thereon by virtue of any Marriage Settlement or otherwise, his Personal Estate is liable to pay off the Mortgage. *Serle v. St. Eloy (g)*.

[The VICE-CHANCELLOR:—At the time when the Testator executed the Mortgage Deed, was the 6,000*l.* his Debt? It appears, by the Recitals in the Settlement as well as in the Mortgage Deed, that the Agreement was to *secure*, not to *pay* the 6,000*l.*]

The Covenant created the Debt; there was no antecedent Debt. The

Testator intended to settle a sum of Money and to make his Personal Estate liable *to pay it. *Waring v. Ward (h)*. It is not a Settlement of Land, but of Money. *Cope v. Cope (i)*.

[The VICE-CHANCELLOR:—Is there any Case like the present, in which it has been decided that the money secured shall be paid out of the Personal Estate?]

There is no case in which it has been decided either way. This Case stands on the general Rule, independent of any authority.

If there were any doubt on the general principle, the Will itself is conclusive. The Testator, after devising his residuary Real Estates, bequeaths his Money in the Parliamentary Stocks or Funds of *Great Britain*. That is a specific Bequest; and it is followed by other specific Bequests. Then the Testator bequeaths the residue of his Personal Estate subject to the payment of all his just Debts, &c. Then follows this proviso: that, if the Residue of his Personal Estate should be insufficient to answer all his Debts, &c., then he charged his Funded Property thereinbefore bequeathed, and,

(g) 2 P. W. 385.

(h) 5 Ves. 670, and 7 Ves. 332.

(i) 2 Salk. 449.

1835.—Graves v. Hicks.

if that should be insufficient, then the residue of his Real Estates thereinbefore devised, with the deficiency: so that the residuary Real Estates are to be only the third Fund for payment of all his Debts. The 6,000*l.* was confessedly a Debt: it was created in the same way as a common Mortgage Debt. The Real Estates are to be the last Fund for the payment of Debts. Can then the Court say that the general rule and the Testator's express direction, are not to prevail? *Barnewell v. Lord Cawdor* (k).

*Mr. Beames, Mr. Patch and Mr. Wood appeared in support [*405] of the Report.

But The VICE-CHANCELLOR, without hearing them, said :

It is plain that the intention of the parties was that the Covenant of the Father should be auxiliary only to the charge upon his Land; and that what he contracted to do, was to give security for the 6,000. The Mortgage Deed recites that, upon the treaty for the intended Marriage, the said *John Hicks* did propose and agree to secure unto the said *Robert Brudenell, &c.*, their Executors, Administrators and Assigns, 6,000*l.* sterling, as and for the Marriage Portion of his said Daughter, by a Mortgage of the Hereditaments thereafter mentioned. Then the Deed proceeds to create the Term to secure the 6,000*l.*; and then, as a matter of course, there is the Covenant for payment of that Sum. The recital in the Settlement tallies with the recital in the Mortgage Deed. Therefore, it is plain, on the face of the Instruments, that the intention was that the Father should give Security on his Land for the 6,000*l.*; and the Covenant was, merely, a matter of form, and only auxiliary. I admit that this sum of 6,000*l.* was, in some sense, a Debt. But it was said that, though the Testator has devised his residuary Real Estates subject to such Charges and Incumbrances as should, at the time of his decease, be existing and charged thereon by virtue of any Marriage Settlement or otherwise, those words mean nothing, as the Devises must take the Estates subject to the Charges: but those words must mean something where the Testator had created a Charge on his Estates for securing that which was not a Debt. In *Serle v. St. Eloy*, the words "subject to the Incumbrances thereon," were held to mean [*406] nothing, because the Charge had been created to secure a Debt. But that was not the case here. Then the Testator, when he disposes of the residue of his Personal Estate, says: "And, as to all the rest and residue of my Personal Estate and Effects, whatsoever and wheresoever, not hereinbefore specifically bequeathed, I give and bequeath the same, subject and charged with the payment of all my just Debts." If the words in the preceding part of the Will, which devised the Estates subject to the Charges and Incumbrances thereon, go for nothing, this direction that his Personal Estate

(k) 3 Madd. 453.

1833.—Gardner v. Lachlan.

shall be first applied for the payment of his Debts, must also go for nothing ; as that must be the case, at all events, by operation of Law. The whole residuary Clause shows that the Testator meant his general Personal Estate to be first applied in payment of his Debts, then his Parliamentary Stocks and Funds, and then his residuary Real Estates. But the question still is what was meant by this word "Debts." Although it is perfectly true that the Covenant, which was merely auxiliary, made the 6,000*l.*, in a certain sense, a Debt, yet, for the purpose of determining the priority, you must consider whether it was a Debt at the time when the Security was created. In *Ex parte Digby*, Lord Eldon says : "The cases of Exoneration go upon the ground that the Money is the Debt of the Person making the Mortgage, at the time. The question here is, whether, at the moment the Charge was made, it was a Personal Debt of The Duchess's." And the question in this Case also is, whether, at the time when the Charge was created, it was the Personal Debt of the party, for which he was making provision ; or whether he was not making a security for a Sum for which he gives this Covenant as an auxiliary security only. In *Lanoy v. The Duke of Athol*, Lord Hardwicke, C. says : "But though there is this Covenant, it is truly said, by the Defendant's Counsel, that the Personal Assets are not the original Fund charged, and, in that respect, differs from a Mortgage or any other Incumbrance ; for, there being a borrowing and a lending in the case of a Mortgage, the Real Estate is considered only as a Pledge ; and the Personal Estate, which is the natural Fund, is liable in the first place : but this Rule has never been carried so far as to extend it to a Provision upon a Settlement."

My opinion is that the finding of the *Master* is right.

Exception over-ruled.

GARDNER v. LACHLAN.

1833 : 12th Dec.—*Bankrupt.—Order and Disposition.*

A., on behalf of the Owner of a Ship, entered into a Charter-party with B, by which B. agreed to pay to A, on behalf of the owner, a certain Sum for the freight of the Ship, by Two Instalments, one to be paid on the sailing of the Ship, and the other, on the completion of the Voyage. The Owner being indebted to C., ordered, in writing, A. to pay to C. all Monies he might receive under the Charter party ; and, accordingly, A. paid over the first Instalment to C. The Owner then assigned, by Deed, the remainder of the Freight to C., who gave notice of the Assignment to A., but not to B. The Vessel completed her Voyage, and afterwards the Owner became bankrupt. Held that the remainder of the Freight was not in his order and disposition at his Bankruptcy.

IN 1831, *John Scott* employed the Plaintiff to act as his Agent in respect

1833.—Gardner v. Lachlan.

of some Ships of which he was the Owner, and *Scott* agreed that all Advances to be made by the Plaintiff, for effecting Insurances on his Ships or otherwise for the purposes thereof, should be secured by a Mortgage of the Ships and their Freight. In March 1832, the Defendant, *Lachlan*, a Shipbroker, on the behalf and by the authority of *Scott*, entered into *a Charter-party, with the Commissioners of the Navy, for the [*408] conveyance of Emigrants to *Van Diemen's Land*, in a Ship belonging to *Scott* called *The Princess Royal*. The Charter-party was dated the 26th of March 1832, and was made between two of the Commissioners of the Navy, of the one part, and *Lachlan* (on behalf of the Owners of the Ship) of the other part, and, thereby, *Lachlan*, on behalf of the Owners, entered into certain Covenants with the Commissioners, and, in consideration of those Covenants being performed by *Lachlan* on behalf of the Owners, the Commissioners, on behalf of His Majesty, agreed to pay to *Lachlan*, on behalf of the Owners, for the Hire and Freight of the Ship, at the rate of 3*l.* 13*s.* per Register Ton, in manner following, (that is to say) one half of the freight to be paid by the Lords of the Treasury, on producing a certificate of the Ship having sailed on her Voyage, and the remainder also by the Lords of the Treasury, on producing certificates of the number of persons that were embarked in England, having been landed at *Hobart's Town*.

In April 1832, the Plaintiff, by *Scott's* direction, insured the Ship and Freight for 1,800*l.*, and paid the Premiums on the Policies: and he retained the Policies in his hands as a security for the amount due to him from *Scott*.

Scott, in order to secure the repayment of some part of the Advances made by the Plaintiff for his use, signed and gave, to the Plaintiff, an Order dated the 25th of April 1832, directing *Lachlan* to pay to the order of the Plaintiff, all Monies he might receive on account of the Ship, under her then Charter to the Navy Board; and the Plaintiff delivered the Order to *Lachlan*.

*Upon the sailing of the Ship, 1,100*l.* became due as one Instalment of the Freight; and *Lachlan* received that sum from the Lords of the Treasury, and, with *Scott's* privity, paid it to the Plaintiff. After the sailing of the Ship, the Plaintiff continued to make Advances on *Scott's* behalf; and, in August 1832, a Balance of 800*l.* was due, from him, to the Plaintiff. *Scott* having delayed to give to the Plaintiff a Security for his Debt, the Plaintiff followed him to *Ireland*, and sued out a Writ for the purpose of arresting him; and, ultimately, *Scott*, after considerable pressure, executed an Indenture dated the 13th of August 1832, and, thereby, after reciting that *Scott* was indebted, to the Plaintiff, in 800*l.*, *Scott* assigned, to the Plaintiff, all the Freight and Earnings of the Ship which

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might become due under the Charter-party, and all Policies of Insurance then effected or thereafter to be effected, in respect thereof in Trust to retain thereout, the 800*l.*, with interest from the 28th of July then last. On the 27th of August 1832, the Plaintiff served *Lachlan* with a Notice of the Assignment, and desired him to hold the residue of the Freight to become due under the Charter-party, on his (the Plaintiff's) account.

In September 1832, the Ship arrived at *Van Dieman's Land*.

On the 15th of January 1833, *Scott* became Bankrupt, and the Defendants *Burn* and others were chosen his Assignees.

The 800*l.* still remaining due, the Bill was filed in July 1833, [*410] stating that the 800*l.* and upwards due for Freight, *was then payable by the Lords of the Admiralty (to whom all contracts entered into by the Navy Board had been transferred by 2 & 3 Will. 4, c. 40) or by the Treasury upon the Certificate or by the direction of the Admiralty, to *Lachlan*, and that the Admiralty were willing to pay that Sum to *Lachlan*, or to give him the necessary Certificate for receiving the same, it being usual to pay the Freight to the Person in whose name the Charter-party is made, and to deal with such Person only: that the Plaintiff was entitled, under his Security, to receive the 800*l.* due for Freight, but the Assignees had, lately, set up a claim thereto, and had given Notice of such Claim to the Admiralty, and required the Fund to be paid to them. The Bill prayed that the Plaintiff might be declared to be entitled, under the Assignment, to receive the Sum due for Freight, that *Lachlan* might be declared to be a Trustee thereof for the Plaintiff, and might be decreed to receive and pay the same to him, and that *Lachlan* might be restrained from paying the same to the Assignees, and that they might be restrained from receiving or demanding the same, and, if necessary, that a Receiver might be appointed thereof.

The Answer of the Assignees submitted that the unpaid Freight did not pass by the Assignment to the Plaintiff, for want of Notice to the Parties by whom the same was payable, prior to *Scott's* Bankruptcy.

The Plaintiff now moved that *Lachlan* might be at liberty to receive the Money due for Freight under the Charter-party, from the Lords of the Admiralty or the other Persons by whom the same might be payable, [*411] and might be ordered to pay it into Court, or that a *Receiver might be appointed thereof, and that the other Defendants might be restrained from receiving the same.

Mr. *Knight* and Mr. *Jacob*, for the Plaintiff :

Lachlan was the only Person who could receive the Freight from the Commissioners, and, therefore, he was the only Person to whom the Notice ought to have been given. The Commissioners dealt with him: he was the

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only Person whom they knew in the transaction. *Scott's* name is not mentioned in the Charter-party. The Commissioners agree to pay the Freight to *Lachlan*, on behalf of the Owners. The 1,100*l.* which was payable under the Charter-party on the sailing of the Vessel, was paid to *Lachlan*, and he paid that Sum to the Plaintiff, under the direction of *Scott*. *Lachlan* is not made a Party to the Charter-party merely as Covenantee, but he is the Person to whom the Money is to be paid. Consequently the Notice given to him was all that was requisite to make him a Trustee for the Plaintiff, and to take the Money out of the order and disposition of the Bankrupt. *Shack v. Anthony* (a) ; *Lefevre v. Boyle* (b).

Mr. *G. Richards*, for the Defendant *Lachlan*.

Mr. *Pepys* and Mr. *Koe*, for the Defendants, the Assignees :

The object of the Bankrupt Laws is to prevent false Credit being gained by supposed Ownership. Persons dealing with *Scott*, would know that his Ship was let to the Government, and would make inquiries and learn that 800*l.* was due for the Freight of it. If *B.* is known [*412] to have a Debt payable to him, it gives him Credit, though it passes through the hands of *A.* The Notice ought to have been given to the Party who owed the Money. *Lachlan* did not owe it.

[The VICE-CHANCELLOR :—Had *Scott* the right to receive the Money from the Commissioners, or only from *Lachlan*, after he had received it from the Commissioners ?]

Lachlan, as Agent or Attorney, made the Contract on behalf of the Owner of the Ship.

[The VICE-CHANCELLOR :—Could *Scott* have recovered the Money, from the Commissioners, at Law ?]

That is a question at Law : he might have recovered the Money in this Court.

[The VICE-CHANCELLOR :—Here the question is the right to receive the Money from *Lachlan*.]

If the Obligee in a Bond assigns the Debt, the Obligor is the Person to whom Notice ought to be given ; and yet the Assignee cannot recover, except in the name of the Obligee. Here the Party to receive the Money, and the Party beneficially entitled to it, are different Persons ; so that the two Cases are identical.

The Authorities cited have nothing to do with the present question. *Shack v. Anthony* merely decided that, in that Case, *Assumpsit* could not be maintained. In *Lefevre v. Boyle*, the question was [*413] whether the Action ought to have been brought in the names of all the Members of the Company, or in the names of the Trustees who sign-

(a) 1 M. & S. 573.

(b) 3 Barn. & Adol. 877.

1833.—Gardner v. Lachlan.

ed the policy and paid the Money due on it; and it was decided that the Action was properly brought in the names of the Trustees. Those Cases related to the form of Action only.

A sum of Money is in the order and disposition of the Party entitled to it, although he is not the Person to receive it.

[The VICE-CHANCELLOR :—The question is, is it a Debt, in Law or in Equity, to *Scott*? There are no circumstances stated which render it equitable that *Scott* should sue the Commissioners. Notice to them might have been necessary, if he could have filed a Bill against them for the Debt.]

The Bill states that *Lachlan* entered into the Contract on behalf of the Owners, and that the Commissioners covenanted to pay the Money to him on behalf of the Owners; so that it appeared, by the Charter-party, that the Money did not belong to *Lachlan*. If it had been an Agreement and not a Deed, the Cases cited show that *Scott* might have maintained an Action for the Money against the Commissioners. If this be a case in which Notice to the Commissioners was not requisite, the Case is altogether out of the Statute. Under that Statute notice must be given to the Party who is to pay the Money. The Notice given to *Lachlan*, was Notice to *Scott's* Agent. If the Assignee of a Bond, gives Notice to the Obligee, he gives it to a Party who has Notice already. If the Commissioners, on [*414] being asked whether any Money was due from them to *Scott*, had answered that it was due to *Lachlan* and not to *Scott*, they would have practised a gross Fraud.

[The VICE-CHANCELLOR :—If *Scott* and *Lachlan* had each applied to the Commissioners for the Money, and they had paid *Lachlan*, could *Scott* have maintained a Bill against them?]

If the Commissioners had paid *Scott*, *Lachlan* clearly could not have maintained an Action against them for the Money. The Plaintiff has put his own construction on what was the effect of the Charter-party; for he took the Assignment of August 1833 from *Scott*, without *Lachlan* being a Party to it.

We submit that the Notice was not sufficient to intercept the payment of the Fund to *Scott*, and, therefore, that it remained in his order and disposition at the time of his Bankruptcy.

The VICE-CHANCELLOR :

The Question raised by this Motion, is a very simple one. The whole difficulty seems to have arisen from not sufficiently attending to the Machinery of the Case.

The Commissioners of the Navy, for their own Personal Convenience, chose to contract (as they were at liberty to do) with an Agent, and not with the Ship-owners themselves, as it is more easy to contract with one

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Person than with many. The effect of the Charter-party was that, when the Vessel had performed her Voyage, Mr. *Lachlan* would, at Law, have a right *to demand from the Commissioners the Sum [*415] payable upon the Charter-party, and Mr. *Scott* would have a right to receive, from *Lachlan*, the Sum which the Commissioners had paid to *Lachlan* : and, unless there were some special Circumstances, *Scott* could have no right whatever to file a Bill against the Commissioners, and ask that they, in the first instance, should pay the Freight to him. If a Bill had been filed, representing that the Voyage had been performed, and praying that the Commissioners might be ordered to pay the Money to *Scott*, the Commissioners might have, successfully, demurred to the Bill; for they would have a right to say that *Lachlan*, their Covenantee, was the Person to receive the Money.

I am willing to admit that there might be such a state of Circumstances as would justify *Scott* in coming into Equity against the Commissioners; but no such Circumstances have yet arisen. The consequence, therefore, is that the Commissioners are only liable, at Law, to pay *Lachlan* : and, being only liable, at Law, to pay *Lachlan*, *Scott* could only assign that which he had a right to, that is, a right to receive the Freight from *Lachlan*, when *Lachlan* himself had received it. Therefore, I am of opinion, that Notice to *Lachlan* was quite sufficient to put this Debt out of the order and disposition of *Scott*.

Supposing that there was any doubt upon the Question, which I think there is not, I ought to grant the Motion*.

*WOODSTOCK v. SHILLITO.

[*416]

1833: 14th Dec — Will.—Construction.

Testator gave the Interest of a Fund to his Wife for Life, and after her death, to such of his four Daughters as should be then living, in equal Shares, during their respective lives; and from and after the several deceases of his Four Daughters, he gave one Fourth of the Capital to their respective Children. One of the Daughters died before the Widow, leaving a Child. Held that the Child became entitled, on the Widow's death, to have one fourth of the Capital transferred to her.

WILLIAM BURROWS, by his Will dated the 22d of July 1805, devised all his Real Estates to his Wife and two other persons, in Trust to sell the same, and he directed the Monies arising therefrom to be added to his Personal Estate and disposed of as after mentioned : and he directed his Personal

* Affirmed by Lord Brougham, C., on the ground that, whatever the right might be, the Money ought to be secured.

1833.—Woodstock v. Shillito.

Estate to be converted into Money, and then proceeded as follows: "And my Will is that all the Monies to be received by my Trustees and Executors as aforesaid, after the payment of all my just Debts, Funeral Expenses, and the Charges of proving and executing this my Will, shall be placed out, in the names of my said Trustees and Executors, on good Real or Government Security or Securities, upon Trust that they or the Survivors or Survivor of them, or the Executors or Administrators of such Survivor, shall and do pay the Interest and Dividends and Profits from time to time arising therefrom, unto my said Wife and her Assigns, for, and towards her Maintenance and the Maintenance and Education of my three youngest Daughters, *Catherine*, *Sophia* and *Amy*, until their respective ages of 21 years or Marriage under that age; and, as and when my said Daughters shall respectively attain the age of 21 years, or shall be married under that age with the consent and approbation of my Executors, I give unto them, my said Daughters, the sum of 500*l.* each, out of the said Capital so by me directed to be placed out by my Executors as aforesaid, having already advanced to my other Daughter, *Mary Ann*, the Wife of Mr. *William Buller*, to the amount of the same sum of 500*l.*: and, as to the remainder of the said

[*417] capital Sum, I direct the same to be continued on the same or such other Securities as my Executors shall think proper, and the Interest, Dividends and Profits from time to time arising therefrom, to be paid into the proper hands of my said Wife, for her own use and benefit, during her natural Life; and, from and immediately after her Decease, I direct the said Interest and Dividends to be paid unto and amongst such of my said four Daughters *as shall be then living*, in equal Shares and Proportions, during their respective Lives; and, *from and after the several Deceases of my said Daughters*, I give one Fourth part of the said capital Sum, and one Fourth part of the Interest which shall be then due thereon, to the respective Children of my respective Daughters, (that is to say), one such Fourth part to the Child or Children of my said Daughter *Buller*, one other like Fourth part to the Child or Children of my said Daughter *Catherine*, one other like Fourth part to the Child or Children of my said Daughter *Sophia*, and the remaining Fourth part of the said capital Sum and Interest to the Child or Children of my said Daughter *Amy*, in such proportions and manner as they, my said Daughters, shall by their Will direct or appoint."

The Testator died in September 1806, leaving his Wife and his four Daughters him surviving.

In 1809 *Catherine* married *John Marsden*, by whom she had Issue one child only. Mrs. *Marsden* died in 1814, and her child in 1829. In 1814, *Sophia* married *William Woodstock*, but there was no Issue of the marriage.

1834.—*Newell v. Townsend*

The Testator's widow died in 1830. Mrs. *Buller* had Issue seven children, three of whom were 'Infants. The Testator's [* 418] Daughter *Amy*, remained single.

The Bill was filed by Mr. and Mrs. *Woodstock*, Mr. and Mrs. *Buller*, and *Amy Burrows*, against the Personal Representatives of the Testator's Widw, the Personal Representative of the deceased child of Mr. and Mrs. *Marsden*, and the children of Mrs. *Buller*, praying that it might be declared that, under the Will, and by reason of the death of Mrs. *Marsden* in the Lifetime of the Testator's Widow, the Female Plaintiffs became entitled as the only Daughters of the Testator who were living at the death of his Widow, in equal shares, during their respective Lives and the Life of the Survivor of them, to the Dividends of the Stock in which the Testator's Estate had been invested.

Mr. *Marsden*, in his Answer, submitted that, on the death of the Widow, he became entitled, as the Personal Representative of his deceased child, to have one Fourth of the Stock transferred to him.

Mr. *Beames* and Mr. *T. H. Hall*, for the Plaintiffs, contended that the Will contained a distinct Gift to such of the Testator's Daughters as should be living at the death of his Widow: that the Court could not reject the words *then living*: that one Fourth of the Stock vested in the deceased child, in the Lifetime of its Mother; but, from the subsequent words in the Will, it was to be collected that there was to be but one period of distribution, which was the decease of the surviving Daughter; and that, in the meantime, the Daughters were Joint Tenants. *Armstrong v. Eldridge* (a).

*Sir *E. Sugden*, Mr. *Spence* and Mr. *Wray*, appeared for the [*419] Defendants; but

The VICE-CHANCELLOR, without hearing them, said:

The question is, what is the meaning of the words: "From and after the several Deceases of my said Daughters?" They mean: "after the deaths of my Daughters respectively." It is clear that the Testator meant to give to the Children the Share of their Mother, on her death. Consequently the Defendant, *Marsden*, is now entitled to his Daughter's Share.

NEWELL v. TOWNSEND.

1834: 13th January.—*Debtor and Creditor*.

Injunction granted to restrain the Goods of a Partnership from being taken in Execution for a Debt due from one of the Partners, who died before the Writ was delivered to the Sheriff.

(a) 3 Bro. C. C. 215.

1836.—*Davies v. Thornycroft.*

THE Goods of a Partnership of which the Plaintiff and *J. N.* were Members, had been taken in Execution for a Debt due from *J. N.* to one of the Defendants. *J. N.* died before the writ was delivered to the Sheriff. The Plaintiff obtained an *ex parte* Injunction to restrain the Sheriff from removing from the Partnership Premises, selling or intermeddling with the Effects of the Partnership.

Mr. *Pepys* and Mr. *Ching*, for the Defendant, now moved to dissolve the Injunction.

Mr. *Knight* and Mr. *Girdlestone*, jun., for the Plaintiff, cited *Taylor v. Fields* (a); and *Barker v. Goodair* (b).

[*320] The Vice-Chancellor said that a Writ of Execution bound the Property in a Debtor's Goods, only from the Delivery of the Writ to the Sheriff (c), who was required to indorse, on the back of the Writ, the day on which he received it: that, in this Case, the Property in the Goods had vested, at Law, in the Plaintiff, the surviving Partner, before the Writ was delivered to the Sheriff, and, therefore, the Defendant could have acquired no legal right to them.

Motion refused, with Costs.

DAVIES v. THORNYCROFT.

1836: 13th Feb.—*Feme Covert*.—*Trust for Separate Use.*

A Trust for the separate Use of a Woman, whether single or married, is valid.

MILLCENT CROXTON, by her Will dated the 29th of September 1815, directed that her Executor should stand possessed of the sum of 600*l.*, part of her Personal Estate, in Trust to permit her Sister *Thomasin Croxton*, and her Niece *Elizabeth Humphreys*, during their joint Lives, to receive the Interest thereof to and for their own use, in equal Moieties; and, from and after the death of *Thomasin Croxton*, then upon further Trust, in case her Niece should survive her Sister, to pay and transfer the 600*l.* and the Securities whereon the same might be then invested, unto her Niece, to and for her own sole and separate Use, independent of any Husband she might marry. And she directed that the Receipts of her Niece alone, whether covert or sole, should, from time to time, be good Discharges, to her Executor, for any sums of Money to which she might become entitled under her Will. But, in case her Niece should die in the lifetime of *Thomasin Croxton*, unmarried and without Issue,

(a) 4 Ves. 396.

(b) 11 Ves. 78.

(c) See 29 Car. 2, c. 8, s. 16.

1836.—*Davies v. Thornycroft.*

then upon further Trust that her Executor should pay and transfer the 600*l.* and the Securities whereon the same might be then invested, unto and equally between and amongst the Children of her Executor and their respective Executors, Administrators and Assigns: Provided that, in case her Niece should marry in the lifetime of the Testatrix's Sister *Thomasin Croxton*, and should, afterwards, die in the lifetime of her said Sister, leaving a Husband or one or more Child or Children her surviving, and who should be living at the death of *Thomasin Croxton*, the 600*l.* should be in Trust for such Person as the Testatrix's Niece should, by Deed or Will, appoint, and, subject thereto, for her Children as therein mentioned. And the Testatrix appointed the Defendant *Thornycroft* her Executor.

The Testator died shortly after the date of her Will. The Executor proved the Will, and retained the Legacy of 600*l.* out of the Testatrix's Personal Estate.

Elizabeth Humphreys, after the decease of the Testatrix, but in the lifetime of *Thomasin Croxton*, married the Defendant *John Foulkes*, and had several Children living. On the 6th of February 1832 *John Foulkes* was declared a Bankrupt, and the Plaintiff and the Defendants *J. Dodd* and *R. E. Davies* were chosen his Assignees.

By a Deed Poll, dated the 16th of February 1832, the Defendant *Elizabeth Foulkes*, in exercise of the power vested in her and enabling her to dispose of her separate Property, and for securing, to the Plaintiff, the "repayment of 293*l.* in which *John Foulkes* was, at his Bank- [*422] ruptcy, indebted to the Plaintiff, appointed and assigned, to the Plaintiff, 293*l.*, part of the Legacy of 600*l.*, and also the sum of 14*l.* 13*s.* annually, during the lifetime of *Thomasin Croxton*, to be issuing and payable out of the Moiety of the Interest of the 600*l.* to which *Elizabeth Foulkes* was entitled under the Will.

Thomasin Croxton died in January 1835.

The Bill alleged that the Defendants pretended that Mrs. *Foulkes*, being a feme covert, had no power to charge the Legacy, and that the Limitation, in the Will, to her separate use, was void and inoperative as against her Husband. Whereas the Plaintiff charged the contrary.

The Bill prayed that it might be declared that the Deed Poll was a good Appointment, and that the Defendant *Thornycroft* became and was a Trustee, for the Plaintiff, of the Legacy or the Security on which it was invested, to the extent of 293*l.*; and that he might be ordered to pay 293*l.*, with Interest since the death of *Thomasin Croxton*, to the Plaintiff.

The Defendant *Thornycroft* put in a general Demurrer.

Mr. *Wigram* and Mr. *Parry*, in support of the Demurrer, relied on the

1836.—*Davies v. Thornycroft.*

Judgment of Sir *C. Pepys*, M.R. in *Massey v. Parker* (a). They also cited *Woodmeston v. Walker* (b), *Jones v. Salter* (c), and *Brown v.*

Pocock (d).

[*423] **[The VICE-CHANCELLOR :—Those Cases proceeded on this, that the policy of the Law being in favour of the Power to assign, the courts will not permit that Power to be restrained by a fetter which is to take effect on a subsequent Marriage; and the Cases of Barton v. Briscoe* (e), and *Newton v. Reid* (f), proceeded on the same principle (g). But this is a different Case.]

Mr. *Knight* and Mr. *Walker*, in support of the Bill :

In *Massey v. Parker*, it was not necessary to decide the present question. It was held that the Control alluded to in the Will, was the Control of the Mother of the Grandchildren, and not the Marital Control. The *Master of the Rolls* says : “ It is immaterial to consider what effect the words might have had, if used with reference to future Husbands of her Grandchildren, because I am of opinion that they are, in this Case, used with reference, not to any Control of such future Husbands of the Grandchildren, but to the possible Control of their Mother.” Therefore, every thing that was said afterwards, was extra-judicial. Besides, the language used in the subsequent part of the Judgment, is not susceptible of the interpretation that has been put on it. When His *Honor* uses the words *Restriction* and *Fetter*, he means the Restraint on Alienation. The Trust for the separate Use of a married Woman, is not a Restriction or a Fetter, but a Guard : it increases her power. Nothing short of an Act of Parliament can say [*424] *that Trusts for the separate Use of unmarried Women cannot be created. *Simson v. Jones* (h) ; *Anderson v. Anderson* (i).

Mr. *Wigram* in reply :

Neither in the statement of the Case, nor in the arguments in *Massey v. Parker*, nor in the Judgment is there a word said as to the Restraint on Alienation. The *Master of the Rolls*, in the first paragraph of his Judgment, which was a written Judgment, says : “ Two questions are raised by this Demurrer : first, whether the Testatrix has, by her Will, given the income of the Fund in question, to the separate Use of her Granddaughter *Eliza* ; and, secondly, whether, if she intended so to do, such intention is now to be carried into effect.” And his *Honor*, after deciding the first question, proceeds to give his judicial Opinion on the second, which he terms the more important question, namely, whether the intention to give the income for the

(a) 2 M. & K. 174. See particularly 182.

(b) 2 R. & M. 197.

(c) 2 R. & M. 208.

(d) Ibid. 210.

(e) Jac. 603.

(f) *Ante*, Vol. IV. p. 141.

(g) The same doctrine was laid down, by The *Vice-Chancellor*, in deciding on a Demurrer in *Johnson v. Freeth*, 2 March 1836. Mr. *Lloyd* for the Demurrer, Mr. *Chandler* for the Bill.

(h) 2 R. & M. 363.

(i) 2 M. & K. 427.

1836.—*Davies v. Thornycroft.*

separate Use of the Grand-daughter, if sufficiently expressed, could, under the circumstances, have effect given to it, so as to deprive the Husband of his ordinary right to the Property. With respect to the word "Fetter," the object of the Trust for the separate Use and of the Clause against Anticipation, is the same, namely, to secure the Property for the benefit of the Wife. The *Master of the Rolls*, after saying that it was decided in *Brandon v. Robinson* (k), that an attempt to fetter the power of Disposition of a Male Legatee, could not succeed, and that it was established, by *Woodmeston v. Walker* and *Brown v. Pocock*, that the same *rule applied to an unmarried Female Legatee, proceeds to [*425] reason on the Trust for separate Use. If *Woodmeston v. Walker*, *Brown v. Pocock* and *Jones v. Salter*, are rightly decided, the decision in *Massey v. Parker* is an unavoidable consequence from them. Suppose a Woman about to marry, to have Property of three Descriptions: 1st. Property held in an ordinary way: 2dly. Property held for her separate Use, without a clause against Anticipation: and, 3dly, Property subject to a clause against Anticipation. The first class of Property would, by the act of Marriage, become the Property of her Husband. So would the third, according to the Cases last referred to. Why should the second be in a different predicament? The Decisions in the Cases last referred to, show that the Will of the Donor is not sufficient to contravene the general rule of Law which gives to a Husband all his Wife's Property. The decision in *Massey v. Parker*, merely assimilates the Property of the second Class to Property of every other kind, and is, for that reason, a sound decision, unless something in the way of Inconvenience can be urged against it. But that argument has no place here. The argument *ab inconvenienti* bears all the other way. Nothing is so convenient as uniformity in Law. Nothing so inconvenient as merely arbitrary distinctions. A Woman being about to marry knows she must settle her general Estate, if she desires to exclude the Marital Control, and she acts accordingly. What principle of convenience can recommend a different Rule in the case of Property settled to her separate Use?

The VICE-CHANCELLOR:

I have not the slightest doubt upon the question.

*I have always understood that it is lawful to give Property to [*426] the separate Use of a Woman married or unmarried, and the Practice of the Profession has been according to that opinion, without any variation (l): and although it is inferred, from some of the expressions used

(k) 18 Ves. 429.

(l) See *Horsman's Precedents*, 3d edit. vol. 1, p. 29, and vol. 2, p. 836. 1122-1131; and *3 Wood's Conveyancing*, 459. 821, 822.

1836.—*Davies v. Thornycroft.*

by the present *Lord Chancellor* when *Master of the Rolls*, in *Massey v. Parker*, that such was not his Opinion; yet what was said in that Case must not be taken as a Decision on the question: for it was not necessary to enter into the Point: and His Lordship seems rather to be addressing himself to the question, whether there can be a restraint on Anticipation, than to the question, Whether there can be a Limitation to the separate Use of a Woman? The Cases of *Newton v. Reid*; *Barton v. Briscoe*; *Jones v. Salter*; *Woodmeston v. Walker*, and *Brown v. Pocock*, are all cases in which the only question was whether, if the Court admits Property to be settled to the separate Use of a Woman, it will also admit of her being restrained from disposing of it. When the Courts have decided that it is inconsistent with a disposition to her separate Use, that she should be restrained from disposing of the Property, they have admitted that it may be given to her separate Use. If, besides the known practice of Conveyancers, Cases are required, the Case of *Simson v. Jones* is decisive. There Leaseholds were given for the separate Use of a Female Infant, absolutely, in the event of her Marriage. She Married under Age, and consequently the Trust for her separate Use became absolute. Upon her Marriage a Settlement was made, with a power of Sale to Trustees. They made [*427] a contract to sell. The objection to the "Title under the Settlement, would have been futile, if the Property could not have been given to the separate Use of the Wife. In that case, it would have been competent to the Husband to assign the Trust of his Wife's Term, according to Sir *E. Turner's Case* (*m*): which Case shows that, so early as 33d Car. 2, the Law of this Court was, not only that the Husband might assign the Trust of his Wife's Term, but that a Term might be assigned in Trust for her separate Use. In *Simson v. Jones*, no question about the Title could ever have arisen, if no such thing could exist as a Trust for the separate Use of a Woman who afterwards marries. Therefore, the decision that the Title was bad, assumed, as its foundation, that there was a Trust for the separate Use of the Wife, and that she, after attaining 21, could have exercised the power of Disposition which is inherent in the very nature of separate Property.

I should be sorry to have it thought that I had any doubt on the question. I wish it, however, to be understood that I take, as the foundation of my Decision, the supposition that the *Lord Chancellor* has not decided otherwise.

Demurrer over-ruled.

(m) 1 Vern. 7.

1834.—HUNTER v. —

*JAMES v. HERRIOTT.

[*428]

1836 : 20th Feb.—*Demurrer*.—*Bill of Discovery*.—*Pleading*.

A Bill of Discovery is demurrable, if the words "stand to and abide such Order and Decree therein" are inserted in the Prayer of Process.

THIS was a Bill of Discovery. The Prayer of Process contained the Words, "Stand to and abide such Order and Decree therein;" and, on that account, the Defendant demurred.

Mr. *Parry*, in support of the Demurrer, cited *Rose v. Gannel (a)*, and *Close v. Froggatt (b)*; in which a Demurrer to a Bill of Discovery was allowed on the same ground.

Mr. *Lane*, in support of the Bill, relied on the *dictum* in *Angell v. Westcombe (c)*, that the words in the Prayer of Process: "To stand to and abide such Order and Decree," &c. are inserted by the Clerk, and do not make the Bill a Bill for Relief.

The VICE-CHANCELLOR :

The words referred to in *Angell v. Westcombe*, were not necessary for the purpose of the Decision. The words: "Stand to and abide such Order and Decree," do make the Bill a Bill for Relief.

Demurrer allowed.

*HUNTER v. — . *

[*429]

1834 : 16th January.—*Practice*.—*Costs*.

Personal service of an Order for Payment of Costs by a Plaintiff to a Person not a Party to the Suit, will be dispensed with where the Plaintiff cannot be found.

A MOTION having been made before The Lord Chancellor, on the part of the Plaintiff, to commit the Defendant's Solicitor, and that Motion having been refused with Costs, the Solicitor, on Affidavit that he had made various efforts, but unsuccessfully, to serve the Plaintiff with the Order under which he was entitled to Costs, now moved that service of the Order on the Plaintiff's Clerk in Court, might be deemed good Service.

Mr. *Beames*, in support of the Motion, cited Wyatt's Pract. Reg. 250,

(a) 3 Atk 439.

(b) MSS. Excheq. H. T. 1826. The Demurrer was argued by Mr. *Martin* and Mr. *Bellasis*.

(c) *Ante*, p. 30.

* *Ex relatione*.

1834.—Russell v. Dight.

and Beam. on Costs in Eq. 250, observing that the Order was, in this Case, on the same footing as the Subpœna, which was the Process to compel payment of Costs as between the Parties to the Suit.

The *Vice-Chancellor* made the Order.

[*430]

*RUSSELL v. DIGHT.

1834: 21st January.—*Defendant*.—*Exceptions*.—*New Orders*.

The Master being about to report the Defendant's Third Answer insufficient, he put in a Fourth Answer, and then moved to stay the Report. Motion refused, the Court having no right [to deprive the Plaintiff of the benefit of the Tenth Order.

THE First and Second Answers put in by the Defendant, had been successively, reported insufficient. He then put in a Third Answer, which was referred back upon the original Exceptions. The *Master* being about to report that the Answer also was insufficient, the Defendant put in a Fourth Answer; and thereupon

Sir *E. Sugden* and Mr. *Wakefield*, for the Defendant, moved that all further Proceedings under the last Order of Reference, might be stayed. They said that though, under the 10th of Lord *Lyndhurst's* Orders, the *Master* might, on the Third Answer being reported insufficient, examine the Defendant on Interrogatories, it was only for the purpose of obtaining his Answer; and as the Defendant had put in his Fourth Answer, the Plaintiff had obtained all that he could require, and, therefore, the Proceedings in the *Master's* Office ought to be stayed.

Mr. *James Russell*, for the Plaintiff, said that, if the Motion were granted, the Defendant would be deprived of the benefits to which he was entitled under the 10th Order.

THE VICE-CHANCELLOR:

I am of opinion that the Fourth Answer was irregularly filed, and that I have no authority to make the Order.

Although, in a common Case, a Defendant is at liberty to put [*431] in an Answer as soon as he has an intimation of the *Master's* opinion that his Answer is insufficient; yet he is not at liberty to do so in a Case where the Plaintiff may derive some benefit by the Judgment of the *Master*. Now, under the 10th Order, some advantage has accrued to the Plaintiff by the report that the Third Answer is insufficient, which I am not at liberty to deprive him of; and, therefore, I shall refuse the Motion with Costs.

1834.—Waterton v. Croft.

WATERTON v. CROFT.

1834: 22d January.—*Practice.—Pleading.*

A Bill was filed against A. and others; but, before he was served with a Subpœna, he went Abroad. The Bill was then amended, by stating that A. was out of the Jurisdiction, and a Decree was made. A. then filed an *Original Bill* to impeach the Decree, on the ground that he was in *England* when the former Bill was filed but was not served with Process. The Defendants demurred on the ground that the Decree could not be impeached except by a *Supplemental Bill* in the first Suit. Demurrer over-ruled.

Practice.—The Court still has jurisdiction to make an Order for Time to answer on the overruling of a Demurrer.

THE Plaintiff claimed to be entitled to an Estate called *Woodlands*, as eldest Son and Heir of *Christopher Waterton* deceased, who, as he alleged, died intestate as to it.

In 1824 a Bill had been filed, (which was afterwards amended,) by *James Croft* and *Thomas Croft*, against *Alexander Baring*, the Plaintiff and several other Parties, alleging that the Estate had been well devised by a Codicil to *Christopher Waterton's Will*, and prayed that the Codicil might be established and the Trusts thereof performed. The Plaintiff and some of the other Persons who were named as Defendants to that Bill, never appeared to it, and, in fact, were never served with Process for that purpose.

*The Decree in that Cause was made on the 18th of Novem- [432]
ber 1828, and, thereby, the Codicil was established, and the Trusts were directed to be performed, and the Estate was ordered to be sold. In December 1833, the Bill in this Cause was filed against *James* and *Thomas Croft* and the other Persons who were named as Defendants in *Croft v. Baring*, stating to the effect before mentioned, and that, at the time of filing the Bill in *Croft v. Baring*, the Plaintiff was in *London*, and that, shortly afterwards, he went to reside at *Ghent*, in *Flanders*: that he returned to *England* in or about October 1826, and resided some time at *Liverpool*: that, on or about the 16th of November 1826, he again left this country and went to *Demerara*, and resided out of the Jurisdiction of the Court until after the Decree in *Croft v. Baring*, and, in fact, he had never been in this country since the 16th of November 1826: that, if he had been served with Process to appear to and answer the Bill in that Suit, he would have appeared thereto, and have defended his Rights and Interests in the Estate called *Woodlands*: that he had been advised that, inasmuch as the Decree was made in his absence, the same was not binding upon him, and that his Rights and Interests in the Estate were wholly unaffected thereby: that he was unable to proceed, at Law, to recover possession of *Wood-*

1834.—*Waterton v. Croft*.

land, because the Legal Estate was outstanding in certain Mortgagees : that *James* and *Thomas Croft* were about to sell the Estate under the Decree : that the Codicil was not duly executed and attested, and that part of the Estate was purchased by the Testator after the date of the Codicil. The Bill prayed that it might be declared that *Christopher Waterton* died intestate as to *Woodlands*, and that, upon his death, the Plaintiff [*433] became entitled thereto as his Heir-at-Law, *subject to the Incumbrances thereon : and, (if necessary with a view to such declaration), that the Validity of the Codicil might be tried at Law : and that it might be declared that the Decree in *Croft v. Baring* was not binding upon the Plaintiff and that his Rights and Interests in *Woodlands* were unaffected thereby, and that he was entitled to the Possession thereof, notwithstanding the Decree ; and that the Sale thereby directed might be stayed.

James and *Thomas Croft* demurred to the Bill for want of Equity ; and because it was not competent for the Plaintiff to impeach the Decree in *Croft v. Baring* by an Original Bill, but he should have taken the proper Measures or Proceedings, in that Cause, for that purpose.

Sir *Edward Sugden* and Mr. *Barber*, in support of the Demurrer :

It must have been sufficiently stated and proved, in *Croft v. Baring*, that the Plaintiff was out of the Jurisdiction. The Court may establish a Will, notwithstanding the absence of the Heir. *Williams v. Whynates* (a).

[*434] *But this Demurrer does not depend upon the Decree being right or wrong, but upon its being what it is. The question is, whether a Defendant who was not within the Jurisdiction when the Decree was made, can file an Original Bill praying for a Decree diametrically opposite to that which has been pronounced ? As he was a Party to the Cause, and the Decree was made in his absence, the Court must presume that his absence was regularly proved. He might, even after the Decree, have put in his Answer and have had the Cause re-heard, or appealed from the Decree, in the same manner as he might have done if he had been present when the Decree was made. But, as he was a Party, he cannot file an Original Bill, though he might have filed a Supplemental Bill. He is bound by the Decree, but he has an opportunity of raising again the Questions in

(a) 2 Bro. C. C. 399. Lord *Redesdale*, however, says : " If the Heir-at law of a Testator who has devised a Real Estate on Trusts, should be out of the Jurisdiction of the Court, and that fact should be charged and proved, the Court will proceed to direct the execution of the Trusts, upon full proof of the due execution of the Will, and of the sanity of the Testator, though that Evidence cannot be read against the Heir if he should afterwards dispute the Will, and the Court, therefore, cannot establish the Will against him, or in any manner insure the Title under it against his Claims " Treat. Plead. 4th edit. 173.

1834.—Waterton v. Croft.

the Suit. An Original Bill may be filed to set aside a Decree on the ground of Fraud: but that is not the ground in this Case. If an Original Bill could be maintained, there would be one Decree declaring the Will well proved and directing the Trusts to be carried into execution, which would bind every one but the Plaintiff, and there would be another Decree declaring the Will not proved; so that there would be two inconsistent Decrees. If this Cause had been set down before The *Master of the Rolls*, he could not have reversed your *Honor's* Decree. The Plaintiff never can withdraw from having been a Party to the Suit. *Gifford v. Hort* (b). There the Plaintiff was not a Party to the original Suit, but came in by succession to the Party who was bound by the Decree, and it was held that he could not file an Original Bill, but must file a Supplemental Bill for the purpose of *appealing from the Decree. This Case is much [*435] stronger than that; for, here, the Plaintiff was a Party to the original Suit.

[The VICE-CHANCELLOR:—I do not understand whether it was alleged that the Plaintiff was out of the Jurisdiction at the time of *filing* the Original Bill. If he was within the Jurisdiction at that time, and was not served with a Subpœna, he is not bound by the Decree.]

If there is any doubt upon that point, the Court may refer to its own Records. But taking it for granted that the Plaintiff was properly alleged to be out of the Jurisdiction, the Decree which declared the Codicil well proved, would have been improper, if the absence of the Heir had not been regularly proved. Every Court must presume in favour of the validity of its own Decree: therefore, either the Bill must have been taken *pro confesso* against the Heir (which is not alleged), or he must have been duly stated and proved to be out of the Jurisdiction.

[The VICE-CHANCELLOR:—It appears, by the Office Copy of the Bill, which has been handed up to me, that, when the Original Bill was filed, the Plaintiff was within the Jurisdiction, and that the Bill was, afterwards, amended by stating him to be out of the Jurisdiction: then the question is, whether he might not have moved to have the amended Bill taken off the File, as stating a fact that happened after the filing of the Original Bill?]

*If a Party is within the Jurisdiction at the time of filing the [*436] Original Bill, and before it is necessary to serve him with a Subpœna, he goes out of the Jurisdiction, you may amend your Bill, by stating him to be out of the Jurisdiction.

Mr. *Pepys* and Mr. *Wigram*, in support of the Bill:

The Plaintiff is not bound by the Decree, for he was within the Jurisdiction

(b) 1 Scho. & Lef. 386.

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at the time of filing the Bill. A decree obtained against a Defendant in his absence, does not bind him, unless you prove that he never was within the Jurisdiction, from the filing of the Bill, down to the examination of the Witnesses to prove it.

The Case of *Gifford v. Hort* does not apply; for there the Plaintiff was not in existence when the Original Bill was filed, and, therefore, could not have been made a Party to it. Here the original Suit was not properly constituted as to Parties.

The Demurrer insists that the Plaintiff is bound to proceed in *Croft v. Baring*. But he was not a Party to that Suit. He was merely named as a Defendant. He was not served with a Subpœna, though he was within the Jurisdiction at the filing of the Bill. Supposing that the Plaintiff might have filed a Supplemental Bill in *Croft v. Baring*, is he bound to do so? May he not also file an Original Bill? The Plaintiffs in that Suit thought proper not to serve him with a Subpœna; and is he to be precluded from filing an Original Bill, because they have alleged, in their Bill, what was not the fact?

[*437] “The objection that there will be two inconsistent Decrees, applies equally to the case of an Infant; and yet Lord *Redesdale* lays down that an Infant may file an Original Bill to set aside a Decree (c). Besides, we seek by our Bill to set aside the original Decree.

The VICE-CHANCELLOR:

It is averred, on this Record, that, at the time of filing the Bill in *Croft v. Baring*, the Plaintiff was in *London*: that, shortly afterwards, he went to reside at *Ghent*: that he returned to *England* in or about October 1826, and resided some time at *Liverpool*: that, on or about the 16th of November 1826, he again left this Country, and resided out of the Jurisdiction of the Court until after the Decree in *Croft v. Baring* was made. The question is, whether that Decree, of necessity, binds the Plaintiff.

If the Plaintiff had been disposed to take advantage of that Decree, he might have so made himself a Party to the Suit as to entitle him to take advantage of it. But the question is, whether he is bound by the Decree, if he does not please to be bound by it. The Plaintiffs in the Suit of *Croft v. Baring*, might have served the Plaintiff in this Suit with Process; but they did not choose to do so; therefore, on the face of this Record, I am of opinion that it is competent to him to proceed just as if no Decree had been made in *Croft v. Baring*: and, consequently, this Demurrer must be overruled.

[*438] “On looking at the office copy of the Bill in *Croft v. Baring* (which it was agreed I should look at), I see no reason to alter

(c) “It has been also said that, where an improper Decree has been made against an Infant, without actual fraud, it ought to be impeached by Original Bill.” *Treat. Plead.* 4th edit. 92.

1834.—Weaving v. Count.

my opinion. It appears that the fact of the Plaintiff being out of the Jurisdiction, was introduced by way of Amendment; but it does not appear at what time the Amendment was made. If the Plaintiff was within the Jurisdiction at the time when the Bill in *Croft v. Baring* was filed, it was not competent to the Plaintiffs in that Suit, to amend their Bill by stating that he was out of the Jurisdiction. They ought to have filed a Supplemental Bill, stating that, since the filing of the Original Bill, the present Plaintiff had gone out of the Jurisdiction of the Court.

Demurrer over-ruled.

ON the over-ruling of the Demurrer the Defendant's Counsel applied for time to answer. Mr. *Wigram* objected that, under the Orders of 1833, the *Vice-Chancellor* had no Jurisdiction to make an Order for time to answer. The *Vice-Chancellor* said he considered that he had Jurisdiction to allow the time, as part of the Order over-ruling the Demurrer; and that it was not a Case contemplated by the Act*: and, accordingly, His *Honor* allowed the Defendants Six Weeks' time to answer.

*LANCASTER v. LANCASTER.

[*439]

1834: 23d January.—Practice.—Witness.

Leave given to Plaintiff, before Answer, to sue out a Commission in a Suit to perpetuate Testimony, the Defendant having been attached, and still refusing to answer.

THIS was a Bill to perpetuate the Testimony of Witnesses to a Will. The Defendant had been taken on Attachment for want of Answer, and committed to the *Fleet*.

Mr. *Cooper*, for the Plaintiff, now moved for liberty to sue out a Commission to examine the Witnesses, as if the Cause were at issue, saying that the Defendant still refused to put in his Answer. He cited *Coveny v. Athill* (a), and *Frere v. Green* (b).

The *Vice-Chancellor* made the Order on the authority of the Case in *Dickens*.

WEAVING. v. COUNT.

1834: 28th January.—Costs.—Insolvent.

In a Foreclosure Suit against an Insolvent Mortgagor and the Provisional Assignee of the In-

(a) 1 Dick. 355.

* 3 & 4 Will. 4. c. 94. s. 13.

(b) 19 Ves. 319.

1834.—*Le Jeune v. Budd.*

solvent Court who claims no Interest, the Plaintiff must pay the Costs of the Assignee and add them to to his Debt.

THIS was a Bill of Foreclosure. The Mortgagor had taken the benefit of the Insolvent Debtor's Act. The Provisional Assignee of the Insolvent Court (who was made a Defendant) by his Answer, submitted whether, by force of the Act or otherwise, the Estate *became [*440] vested in him for the benefit of the Creditors; and disclaimed all Interest other than such (if any) as might be vested in him, as Provisional Assignee, in Trust for the Creditors: and hoped that the Court would take care of the interest of the Creditors.

The *Vice-Chancellor* made an Order, as to the Costs of the Provisional Assignee, similar to that in *Woodard v. Haddon (a)*, and on the same ground.

Mr. *Spence* for the Plaintiff.

Mr. *Reynolds* for the Provisional Assignee.

[*441]

*LE JEUNE v. BUDD.

1834 : 29th and 30th January.—*Legacy.—Consent to Marriage.*

Testator directed his Trustees to pay, to his Daughters, their Portions on their marrying with the Consent, in Writing, of his Trustees first had and obtained; and, on their marrying without such Consent, that the Trustees should stand possessed of their Fortunes, in Trust for their separate use, for Life, with Remainder to their Children. A. proposed to the Trustees to marry one of the Daughters, who was an Infant. The Terms, as communicated to her by one of the Trustees, were, that 500*l.* should be paid to A., on his marriage, out of her Portion, and that the Remainder should be invested, in the names of Trustees, for her sole use and benefit, the Interest to be paid to her only. The Daughter accepted the Proposals, and asked the Consent of the Trustees. The same Trustee then wrote a Letter, to the Daughter, saying that he and his Co-Trustee had not then signed the Consent, *but were ready to do so as soon as requisite*; and a Draft was prepared by which (subject to the payment of the 500*l.* to the Husband) the Portion was settled on the intended Husband during his solvency, then on the intended Wife for her separate use, for Life, with Remainder to the Children, with Remainder to the Survivor of the intended Husband and Wife. A. having made certain arrangements for the disposal of the 500*l.*, which the Trustees disapproved of, the Trustees who had written the Letter, refused to look at the Draft of the Settlement, saying he should expect A. to make some other Proposals respecting the disposal of the 500*l.* Another arrangement was accordingly made and communicated to the Trustee, but he took no notice of it, and his Name was struck out of the Settlement; and the Marriage (to which his Co-Trustee had duly consented) was had without further communication with him. Held that the Letter was a sufficient Consent on his part to the Marriage.

JOHN GILLBANK, Victualler, by his Will dated the 9th of April 1829, de-

(a) *Ante*, Vol. IV. p. 608.

1834.—*Le Jeune v. Budd.*

vised to *George Budd* and *Thomas Clayton*, all his Freehold Estates in Trust to sell, and declared that the Proceeds should be deemed part of his Personal Estate; and he gave the residue of his Personal Estate to the same Persons, in Trust to invest the same and also the Proceeds of his Real Estate, in the Three per Cent. Reduced Annuities, and to stand *possessed of the Stock in Trust to transfer the same equally [*442] among his Children, *Haveill, John, Emma Sophia* and *Hannah*, the Shares of his Daughters to become vested in them at 21 or Marriage; and he appointed *Budd* and *Clayton* Executors of his Will and Guardians of his Children during their Minorities.

The Testator, by a Codicil bearing even date with his Will, after reciting that he had directed, by his Will, that the Shares of his Estate and Effects therein bequeathed to his Daughters, should be transferred to them at 21 or Marriage, declared that his Trustees should stand possessed of the Stocks and Funds so bequeathed to his Daughters, until they should respectively be married *with the Consent and Approbation in Writing first had and obtained of his Trustees* or the survivors or survivor of them, and should, after the vesting of such Shares and until such Marriage, pay to his Daughters the Interest and Dividends of their Shares; and that, on the respective days of Marriage of his Daughters *with the Approbation in Writing of his Trustees before mentioned*, the Trustees should transfer to them the Shares of his Estate and Effects bequeathed to them by his Will; but, in the event of his Daughters or either of them being married without the Consent of his Trustees as aforesaid, he directed the Trustees to stand possessed of her or their Share or Shares for her or their separate use for Life, and, after the decease of either of his Daughters, that the Interest and Dividends of her Share should be applied for the Education and Maintenance of her Children, until they attained 21, with benefit of survivorship, at which period he directed that the Share or Shares to which his Daughters were *entitled for Life, should be divided, equally, among their res- [*443] pective Children, and, in case his Daughters or either of them so marrying without the Consent of his Trustees, should die without Children, then that the Trustees should pay her or their Share or Shares to such Persons as his Daughters, or either of them, should by Will direct, and, in default of such direction, to such of his Children as should be living at her or their Decease, in equal proportions.

The Testator died in February 1830. The Trustees sold his Real Estates, and invested the proceeds and the residuary Personal Estate as directed by the Will. In March 1831, *A. P. Le Jeune*, a Music Master without Fortune, who, for some time before, had paid his addresses to the Testator's daughter *Emma Sophia*, communicated to *Clayton*, (with whom

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he was well acquainted,) his desire to marry her; upon which *Clayton* said that, if *Le Jeune* would settle the greater portion of Miss *Gillbank's* fortune upon her and the Issue of the Marriage, he should not object to the match: and *Clayton*, at *Le Jeune's* request, informed *Budd* of the proposal; and *Budd* replied that he saw no objection to the Marriage, provided a settlement of all Miss *Gillbank's* fortune, except 500*l.*, which might be advanced to *Le Jeune* as an outfit on the Marriage, were made in the way proposed. In August 1831 *Le Jeune*, who had been, previously, introduced to *Budd* by Miss *Gillbank*, personally communicated to *Budd* his desire to marry her and to make the Settlement as suggested; to which *Budd* replied that he saw no objection and that he would write to Miss *Gillbank*, who was then in the country, on the subject. Accordingly *Budd*, on the [*444] 31st of August 1831, wrote a letter, to Miss *Gillbank*, as follows:

"Since you were at my house last week I have seen Mr. *Le Jeune*, the person whom you introduced to me as your intended Husband. The Proposals made, by Mr. *Le Jeune*, to Mr. *Clayton* and myself, are these: that, on his Marriage with you, we shall give to him a portion of 500*l.*, out of the Principal of your Money, the remainder to be invested in the names of two Trustees for your sole use and benefit, the Interest of which to be paid to you only. The sum of 500*l.* that he receives he will make what use he pleases of, as we cannot interfere with any Speculation he may please to enter into, any further than our opinion may be asked by him. He has promised me that, with the money so received, he will procure for you a suitable home, and such a one as you shall feel comfortable with. Now I wish you to answer this letter by saying whether it is your particular wish to be married to Mr. *Le Jeune* under such circumstances; if so, you will, in your Letter, ask the consent of Mr. *Clayton* and myself to the Marriage, by giving so much money and settling the remainder on yourself. That being done, you will, also, name two Persons to be your Trustees under a Marriage Settlement. Upon the receipt of your Letter, any Arrangement you wish shall be immediately entered into."

Miss *Gillbank* answered this letter on the 2d of September, saying that she fully approved of *Le Jeune's* Proposals, and requested the Consent of *Budd* and *Clayton* to the Marriage; and she nominated them as Trustees of her Settlement.

[*445] *A. P. *Le Jeune*, in contemplation of his Marriage and with Miss *Gillbank's* Approbation, arranged with his Uncle, *Joseph Le Jeune*, a Staymaker, to lend him, *J. Le Jeune*, the 500*l.*, and that A. P. *Le Jeune* should take Apartments in his house, at a weekly rent; that Miss *Gillbank* should be taught the business of Staymaking, and that *Joseph*

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Le Jeune should pay her a Salary of 75*l.* a year, for seven years. *Clayton* and *Budd*, when they were informed of this Arrangement, objected to it, on the ground that it would be injurious to Miss *Gillbank's* health, and for other reasons.

On the 22d of September 1831, *Blake*, the Solicitor of the Trustees, had an interview with *Budd*, and then pointed out to him what he considered to be the proper Terms of the intended Settlement; and *Budd* approved of them and directed *Blake* to prepare the Settlement accordingly.

On the 26th of September, *Budd* wrote to Miss *Gillbank* as follows: "I beg to inform you that Mr. *Blake*, the Solicitor has received every necessary Instructions to prepare the Marriage Deed, and everything is now going on that can be done till your presence will be required to make it complete. Mr. *Clayton* and I have not yet signed the Consent, but we are quite ready to do so as soon as requisite, as we consider, from your Letters, that it is your wish, and that your happiness depends upon the proposed Union. Thus far things are arranged, and I am not aware any obstacle can possibly present itself to prevent your Marriage. That point being settled, you are quite free to act on your own opinion relative to Mr. A. P. *Le Jeune* embarking the 500*l.* in the way proposed. *Budd* then mentioned the "grounds on which he and *Clayton* thought that [*446] the proposed arrangement was objectionable, and concluded as follows: "I am not aware that I shall have occasion to write to you again, as I suppose that, when every necessary arrangement is made, a Summons from another quarter will be more cheerfully obeyed."

On the 29th of October, *Blake* called on *Budd* with the Draft, and said that he had prepared a Settlement as agreed on at their former interview, and in such a manner as he considered would be most beneficial to the Parties: and he was about to produce and read the Draft, when *Budd* observed that he disapproved of the Loan to *Joseph Le Jeune* and of Miss *Gillbank's* residing in his house after her Marriage, and said that he should expect other Proposals to be made by A. P. *Le Jeune* respecting the use he should make of the 500*l.* and the residence of himself and his intended Wife; and he declined to look at the Draft, but did not make any other objection to the Marriage.

On the 5th of November, Miss *Gillbank* wrote to *Budd* as follows: "Having understood that you now object to the Arrangement which had been previously agreed upon respecting the sum to be paid to my intended Husband on the day of our Marriage, I am under the necessity of reminding you that the Affair has now proceeded so far with the Consent and Approval of yourself and Mr. *Clayton*, that it is impossible for me to withdraw from or suspend the Engagement for any length of time, without the

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greatest injury to my happiness. As I feel well assured, from the kind care and attention to my welfare and happiness which you have always [*417] evinced, you will not willingly retard or "impede them by longer objecting to the Terms of the Marriage as previously agreed upon, I trust that, ere this, you will have reconsidered the subject and decided that you cannot and ought not, in justice to myself and Mr. *Le Jeune*, attempt to alter those Terms to which you had, more than a month since, assented. As it is impossible for Mr. *Le Jeune* to arrange his plans of Settlement in Life in any other manner than that he has already communicated to you, and as I am now extremely anxious for the accomplishment of our Union, I hope you will favour me with a Letter, at your earliest convenience, allaying my anxiety on this subject and expressing your willingness to permit your name to remain in the Marriage Deed as a Trustee."

In consequence of the disapprobation expressed by the Trustees, the Arrangement with *Joseph Le Jeune* was abandoned ; and, on the 12th of November, *A. P. Le Jeune* wrote to *Budd* and informed him thereof, and added that he proposed to take suitable lodgings in some respectable house and to invest in the Funds so much of the 500*l.* to be paid him on his marriage, as would not be required as an Outfit, and that the residue of *Miss Gillbank's Fortune* would, of course, be settled on herself and family in the way agreed upon. *Budd* returned no Answer to either of the two last-mentioned Letters. On the 15th of November *Clayton* gave his Consent, in Writing, to the Marriage. On the 25th of November the Settlement was executed, *Budd's* name having been struck out, as a Trustee, and *F. Hutchinson's* name substituted for it

The Trusts of the Settlement were to raise 500*l.* out of *Miss* [*418] *Gillbank's* Share of her Father's Estate and "pay the same to *A. P. Le Jeune* for his own absolute use, and to pay the Interest and Dividends of the Residue to *A. P. Le Jeune*, until he should assign, charge or otherwise dispose thereof, or attempt or agree so to do, or become Bankrupt, or take the benefit of the Insolvent Debtors' Act, or do any other act whereby the Interest and Dividends would become vested in any other Person ; and, on his doing any of the acts before mentioned, then, during the joint Lives of *A. P. Le Jeune* and his intended Wife, to apply the Interest and Dividends for her separate use, and, if he should survive her, then to apply the Interest and Dividends for the maintenance and support of *A. P. Le Jeune* and the Issue of the Marriage, or of the Issue alone, as the Trustees should think fit, and, after *Le Jeune's* Death, if *Miss Gillbank* should survive him, to pay the whole of the Interest and Dividends to her for Life, and, after the Decease of the survivor, to stand possessed of the Principal, in Trust for the Children of the marriage as *Le Jeune* and *Miss Gillbank*, during their joint Lives,

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should appoint, and, in default thereof, as the survivor should appoint, and, in default thereof, in Trust for the Children of the Marriage, and, if there should be no such Child, then in Trust for the survivor of *Le Jeune* and Miss *Gillbank* absolutely.

On the 28th of November, without any intimation given to *Budd*, the Marriage was solemnized, and on the same day, *Budd* was informed of it by a Letter written to him by *Clayton*. Shortly afterwards, *A. P. Le Jeune* applied to *Budd* to concur with *Clayton* in transferring Mrs. *Le Jeune's* Fortune to the Trustees of the Settlement. *Budd* having declined complying with that application, on the 14th of December 1831, [*449] (Mrs. *Le Jeune* being still an Infant), the Bill was filed out by Mr. and Mrs. *Le Jeune*, *Clayton* and *Hutchinson*, against *Budd*, praying that he might be ordered to make the transfer.

Budd, in his Answer, said that he intended, and conceived that he must have expressed that the Settlement was to be on Mrs. *Le Jeune* herself, to her sole and separate use, and not on her Husband, who was not to have any Interest in her Fortune beyond the 500*l.*: that he understood the terms of the Settlement, as communicated to him by *Blake* at their interview on the 22d of September, to be conformable to the terms expressed in his Letter of the 31st of August that is to say as being a Settlement of the whole of Mrs. *Le Jeune's* Fortune, except the 500*l.* for Outfit, for her separate use for Life, with Remainder to her Children in exclusion of her Husband, and that he never had the slightest notion of any other Settlement being in contemplation: that whatever might be the legal effect of his Letters, he always considered that his formal Consent in Writing yet remained to be required and given, though he had no wish to interpose any obstacle to the Marriage and merely intended to use the control vested in him, before he finally gave his formal Consent, for the purpose, not only of securing the Settlement of his Ward's Fortune so as to exclude her Husband from any control over it, but also of regulating the disposition of the Sum to be advanced for Outfit: that *Blake* did not produce or show to him the Draft of the Settlement or explain to him the contents thereof: and he submitted whether the Marriage had been solemnized with his Consent and Approbation in Writing within the provisions of the Codicil, the condition annexed to his Consent in his Letter of the 31st of August not having been complied with. The [*450] Answer concluded with setting forth a Letter dated the 13th of December 1831, from Mrs. *Le Jeune's* Brothers to *Budd*, requiring him not to part with their Sister's Fortune, on the ground that she had married without Consent: and *Budd* submitted that they and their Sister *Hannah* were necessary Parties to the Suit.

In June 1832, the Bill was amended by making Mrs. *Le Jeune's* Brothers and Sister Defendants.

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Mr. *Knight* and Mr *Bichner*, for the Plaintiffs :

A Consent to a Marriage may be good, though it was not formally given, and even though the Party who gave it, may not have intended it to be final. *Budd*, in his Letters of the 31st of August and 26th of September, encouraged the Marriage, and gave an unconditional Consent in Writing to it, which he never afterwards could retract. The Testator did not require the Trustees to see to the propriety of the Settlement, but to the propriety of the Marriage. By the Codicil, the Trustees were not required to direct any Settlement to be made, but the Shares of the Daughters were given to them absolutely on their marrying with Consent. The Settlement alluded to in *Budd's* Letter of the 31st of August, would have been no Settlement at all as it would have enabled Mrs. *Le Jeune* to give the whole of her Property to her Husband. The Trustees objected to the arrangement entered into with *Joseph Le Jeune*, and that arrangement was abandoned ; still, however, *A. P. Le Jeune* was to have the 500*l.* for Outfit. *Blake*, in his Evidence, swears that on the 22d of September he communicated to *Budd* the scope and effect of the intended Settlement, and that *Budd* assented

thereto, and never required that the Property should be settled on [*451] Mrs. *Le Jeune* and her Children, to the exclusion of her Husband ;

but, on the contrary, that he assented to *Blake's* recommendation that Mr. *Le Jeune*, who had no Fortune of his own, should be permitted to receive the Interest of his Wife's Fortune during his life, as, in case she were to receive it, it might create discord between them. *Blake* further swears that *Budd* ultimately left it to him to prepare a Settlement upon the terms proposed, or in such other manner as he might, on further consideration, think more beneficial to Mr. and Mrs. *Le Jeune*, except that the 500*l.* was to be paid to Mr. *Le Jeune*, immediately on the Marriage taking effect. At the interview which took place on the 29th of October, *Budd* did not object to the Settlement, which was a reasonable and prudent one : he, merely, disapproved of the Loan of the 500*l.* to *Joseph Le Jeune*, and of Mr. and Mrs. *Le Jeune* going to reside with him after their Marriage ; and that arrangement was subsequently put an end to. *Dashwood v. Bulkley* (a) ; *D'Aguilar v. Drinkwater* (b) ; *Lord Strange v. Smith* (c) ; *Burleton v. Humfrey* (d) ; *Worthington v. Evans* (e) ; *Daley v. Desbouverie* (f) ; *Merry v. Rives* (g).

Sir *E. Sugden* and Mr. *O. Anderdon*, for the Defendant *Budd* :

The question is, when and on what Terms *Budd* consented to the Marriage.

(a) 10 Ves. 230.

(d) Ibid. 256.

(g) 1 Eden, 1.

(b) 2 V. & B. 225.

(e) 1 Sim. & Stu. 165.

(c) Amb. 263.

(f) 2 Atk. 261.

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According to the Plaintiff's own statement, the Draft of the Settlement was to have been submitted to *Budd*. *The Settle- [*452] ment, however, was executed, and the Marriage was had, without any intimation given to *Budd*. *Blake*, it is true, called on *Budd* with the Settlement, but did not read it to him, as he did not approve of it, but said he should expect other Proposals to be made by *Le Jeune*, respecting the use he should make of the 500*l.* : and afterwards *Budd's* name was struck out.

According to the Case made by the Bill, the bulk of the young Lady's Fortune was to have been settled on herself and her family : and *Le Jeune*, in the Letter which he wrote to *Budd* on the 12th of November 1831, says : " The residue of Miss *Gillbank's* Fortune will, of course, be settled on herself and family in the way already agreed upon." The argument for the Plaintiffs, is a departure from the Bill. It appears, from the Correspondence, that the Settlement that was intended, was a Settlement on the Wife for her separate use. The effect of that which has been executed, is to take away from the Wife the Enjoyment of the Property during her Husband's Solvency. The Property too is given to the Survivor, in the event of there being no Children of the Marriage. It is an unusual Settlement, and not that which *Budd* consented to.

The Cases cited do not apply ; for, in this Case, there is no Forfeiture in the event of a Marriage without consent.

Mr. *Pepys* and Mr. *Lloyd*, for the Defendants, the Brothers and Sisters of Mrs. *Le Jeune*, said that, by the Codicil, a Provision was made for the Testator's Daughters, whether they married with or without the Consent of the Trustees : that the obtaining of the Consent, was *made a Condition precedent : and that, if *Budd* had given any [*453] Consent at all, the Condition on which it was given, had not been complied with ; and, therefore, the Gift over in the Codicil, had taken effect. *Gillet v. Wray* (h).

Mr. *Errington* appeared for the Infant Child of Mr. and Mrs. *Le Jeune*, who was made a Party to the Suit by Supplemental Bill.

The VICE CHANCELLOR :

The question is what is the effect of the Transactions between the Parties, having regard to the Provision in the Codicil ?

It has been argued that the real object of the Testator in making the Codicil, was to secure a proper Settlement on his Daughter, through the Intervention of the Trustees. But the Testator has not directed that his Trustees should see to the making of any Settlement in the event of their Consent to the Marriage not being given, but has limited over the Property

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in a particular manner, which amounts to a Settlement, in that event; and there is an absolute Gift to the Daughters in the event of their marrying with Consent. [His Honor here read the Codicil]. It is plain, therefore, that what the Testator intended, was that the Trustees should exercise no control, except as to the Property of the Marriage. The Courtship commenced in the Spring of 1831. The first Meeting between the Trustees and *Blake*, took place in May or June of that year. Some conversation then took place respecting the proposed Marriage, *but nothing definite was arranged. There having been a Proposal made that 500*l.* should be advanced to the Uncle of the intended Husband, and that the young Lady should reside in his House and be taught the business of Stay-making, *Budd*, on the 31st of August 1831, wrote this Letter to her: [His Honor here read the Letter]. By the words: "On the receipt of your Letter, any Arrangement you wish shall be immediately entered into," he, of course, meant: "On the receipt of your Answer in the affirmative." It struck me that it might be questionable whether, on this Letter alone, there would not be strong ground for saying that there was a Consent in writing, if she wrote such an Answer as he suggested. On the 2d of September, Miss *Gillbank* wrote an Answer to *Budd's* Letter; and no one can deny that it was such an Answer as he must have anticipated. But the matter did not rest here; for, on the 22d of September, a Meeting took place between *Budd* and *Blake*: and, whatever took place at that meeting, whether *Budd* more or less distinctly understood what *Blake* said to him, on the 26th of September, *Budd* wrote this Letter to the young Lady: [His Honor here read the Letter]. It is quite plain, on the face of this Letter, that *Budd* supposed that some more formal Consent must be given by him and *Clayton* to the Marriage; but, at the same time, no other construction can be put upon it than that it was a Writing signed by *Budd* and consenting to the Marriage. Nothing in it holds out that his Consent was to depend upon the making of the Settlement in one way or another; but it was a complete unequivocal Consent. He tells Miss *Gillbank* that Mr. *Blake* had received every necessary Instruction to prepare the Marriage Deed, and that every thing was then going on that [*455] could be done till her *Presence should be required to make it complete. Miss *Gillbank* wrote an Answer to this Letter, in which she alluded to the Advice which *Budd* and *Clayton* had given her. The Advice which they had given her, was not as to the Form of the Settlement, but as to her living in the House of *Joseph Le Jeune*. Nothing had passed, between *Budd* and her, to which this Letter of hers could refer, except the Advice which he had communicated to her, in his Letter of the 26 of September, as to the Proposal of living in the House of Mr. *Joseph Le Jeune*.

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My opinion is that, on the 26th of September, *Budd* had given an unconditional Consent, which he could not afterwards withdraw.

The Arrangements that were to be made respecting the young Lady's Place of Residence and the disposal of the 500*l.*, were considered as formal merely, and not as Conditions. It is not necessary, therefore, to enter into the Cases, but only to say that, when an absolute Consent has been once given, the Party is not at liberty to retract it.

At the Meeting between *Blake* and *Budd* on the 29th of October, there was a Declaration, on *Budd's* part, that he did not desire to see the Draft of the Settlement, and *Blake*, therefore, had no other course to pursue but to complete the Settlement according to the original Instructions: and it does not appear that the Settlement actually made, was at variance with that originally proposed, except that *Budd's* Name was not found in it. The Letter of the 31st of August was not written by a Professional Person, and did not accurately point out *any particular Terms [*456] of Settlement. All that it said was that Mr. *Le Jeune* was to have a Portion of 500*l.* out of the Principal of the Money, and that the Remainder was to be invested, in the Names of two Trustees for Miss *Gillbank's* sole use and benefit, the Interest of which was to be paid to her only. All that was meant was that a Settlement should be made, giving Miss *Gillbank* an Interest for her Life. After the Interview of the 29th of October, Miss *Gillbank* wrote to *Budd* the Letter of the 5th of November, to which, as I understand, *Budd* never sent any Answer, though it did not hint at any objection to the Settlement, except with respect to the 500*l.* If *Budd* had objected to the Terms of the Settlement generally, he should have answered that Letter, and said that he thought the Settlement wrong. Then, on the 12th of November, Mr. *Le Jeune* wrote a Letter to *Budd*, in which he said that so much of the 500*l.* as should not be required for Outfit, should be invested in the Funds, and that the Residue of Miss *Gillbank's* Fortune should be settled on herself and Family in the way agreed upon. To this Letter also no Answer was returned. The Marriage took effect on the 28th of November, and, after the Marriage, Application was made to *Budd* to transfer the Fund; and the question is whether he was justified, in point of Law, in refusing to make the Transfer. *Budd's* objection is put upon this; not that the Settlement was wrong; but that he had not given his Consent. I do not think that there is anything, in the Settlement, so wrong as that a Trustee could reasonably object to transfer the Fund.

I am of opinion that the whole Defence as to *Budd*, utterly fails, and that his Conduct has made this Suit, necessary. If the *Gillbanks* had not written their Letter *to *Budd*, they must have been made [*457] Parties in respect of their Interest. The Plaintiffs must pay

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their Costs, and also the Costs of the Infant; and those Costs and their own must be paid to them by *Budd*.

MYTTON v. BOODLE.

1834: 30th January.—Will.—Construction.

Testator bequeathed 5,000*l.*, to *A.*, if he attained 21, but if he should not attain that age, or die without leaving Issue Male, then over. Held that the 5,000*l.* vested, absolutely, in *A* on his attaining 21.

THE Sum of 6,500*l.*, (of which 1,500*l.* belonged to *Moses Corbet* and the Residue was subject to the Trusts of his Marriage Settlement), was secured by a Mortgage of the Estates of *J. Mytton*, deceased, for a Term of Years which had become vested in *Moses Corbet*. The Plaintiff was the Eldest Son and Heir of *J. Mytton*.

Moses Corbet, by his Will dated the 7th of March 1803, bequeathed 1,500*l.*, therein mentioned to be remaining due to him by *J. Mytton*, then lately deceased, and secured upon all or some Parts of his Estates, to the Plaintiff, the Son of the said *John Mytton*; but, if the Plaintiff should die before he attained the age of 21 years, then the Testator bequeathed the 1,500*l.* to certain other Persons in his Will mentioned: And the Testator, after stating that, if he should survive his Wife, he should, under the Trusts of his Marriage Settlement, become entitled to the Sum of 5,000*l.* remaining due and secured upon all or some Parts of the Estates of *J. Mytton*, deceased, did, in case the 5,000*l.* should, at any time, come to or vest in him or in any Person or Persons in Trust for him, bequeath the same to the Plaintiff, if he should attain the age of 21 years, but, if he should not attain that age or die without leaving Issue Male of his Body [*458] living at his Death or born alive *afterwards, then the Testator bequeathed the 5,000*l.* to certain other Persons in his Will mentioned. The Testator, by a Codicil, after reciting that, by the Death of his Wife, he had become entitled to the 5,000*l.*, bequeathed the same to the Plaintiff, if he attained the age of 21 years, but, if he should not attain that age, or die without leaving Issue Male of his Body living at the time of his Death or born alive afterwards, then the Testator bequeathed 2,000*l.* of the 5,000*l.* to the Defendant *Rebecca Mytton* (the only Sister of the Plaintiff's Father), her Heirs, Executors, or Assigns, if she was alive at the time of his, the Testator's, Death; but, if she was dead, then he bequeathed the 2,000*l.* and the remaining 3,000*l.* of the 5,000*l.* to *John Corbet*, since deceased, in Trust for his Children by his Wife, *Ann Corbet*,

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as should be alive at the time of his Death (except the Eldest Son who would be amply provided for otherwise): and the Testator bequeathed the 1,500*l.*, also remaining due to him by *John Mytton* and equally secured upon all or some Parts of his Estates, to the Plaintiff; but, if the Plaintiff should die before he attained the age of 21 years, then the Testator bequeathed the last-mentioned Sum to certain other Persons therein mentioned.

The Testator died on the 28th of August 1809.

The Bill was filed in 1833, against the Personal Representatives of the Testator, and against *Rebecca Mytton*, and the younger Children of *John Corbet*, stating that the Plaintiff had attained 21 and had Issue Male, and that, in consequence, he was entitled, under the Will and Codicil, to the 6,500*l.* absolutely, and to have the Mortgage Term assigned according to his Directions: *that, being seised in Fee of the [*459] Mortgaged Premises, he had agreed to sell the same, and was desirous of having the Term assigned in Trust for the Purchaser and to attend the Inheritance: that the Defendants *Rebecca Mytton* and the Children of *John Corbet*, pretended that the Plaintiff was entitled to a Life Interest only in the 5,000*l.*, and that, if he should die without leaving Issue Male of his Body, the Bequest over to them would take effect; but the Plaintiff charged that, by having attained 21, he had become absolutely entitled to the whole of the 6,500*l.*, and that, for the same reason, the Bequest over had become incapable of taking effect. The Bill prayed for a Declaration that the Plaintiff was absolutely entitled to the 6,500*l.*, and that the Representatives of the Testator might be ordered to assign the Term as he should direct.

The Cause now came on to be heard as a Short Cause.

Sir *E. Sugden* and Mr. *Beales*, for the Plaintiff, cited *Beachcroft v. Broome* (a) and *Cuthbert v. Purrier* (b); and said that the 5,000*l.* was not to go over either in the event of the Plaintiff attaining 21, or in the event of his dying under that age, if he left Issue Male; and that his Issue would take the Estate out of which the Term was created.

Mr. *Knight* and Mr. *Stuart* for the Defendants, the Legatees over, said that there was no Gift of the 5,000*l.* to the Plaintiff, except on his attaining 21, and that he *then took a vested Interest, sub- [*460] ject to be divested on his dying without leaving Male Issue (c).

Mr. *Dixon*, for the Testator's Representatives.

THE VICE-CHANCELLOR:

According to the Construction contended for by the Defendants' Counsel,

(a) 4 T. R. 441.
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(b) Jac. 415.

(c) See *Lyon v. Mitchell*, 1 Madd. 467.

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there would have been an Intestacy if the Plaintiff had died under 21 and had left Issue Male.

I am of opinion that the Testator did not intend the Legatees over to take, if the Plaintiff died under 21 leaving Issue Male; but that his clear intention was that, if the Plaintiff attained 21, he should have the 5,000*l.*, and, if he died under 21 leaving Issue Male, that he should also have the Legacy.

Declare the Plaintiff to be absolutely entitled to the whole 6,500*l.*

THE ATTORNEY-GENERAL v. SHORE.

1834: 4th February.—*New Orders.—Construction.*

Where a Decree in a Cause in which previous References have been made, directs a Reference to the *Master in rotation*, the Decree will be carried to the *Master* to whom the previous References were made.

MOTION that the Reference directed by the Decree to the *Master in Rotation*, might be declared null and void, and that the Reference might be made to the *Master* to whom the previous References in the Cause had been made (a).

[*461] *Mr. Rolfe and Mr. Booth in support of the Motion.
 Sir E. Sugden, Mr. Knight and Mr. C. Romilly, contra.

The VICE-CHANCELLOR:

I am of opinion that the Language of the Decree is right. It is clear, from the Language of the 17th Order, that the *Master in Rotation* is the *Master* to whom the previous References in the Cause were made

BURNELL v. THE DUKE OF WELLINGTON.

1834: 5th February.—*Practice.—Reviver.*

Motion, before Decree, by the *Executor*, of a deceased Defendant, that the Plaintiff might revive the Suit against him, or that the Bill might be dismissed as against the Deceased, granted.

MOTION, before Decree, by the *Executor* of the late Duke of Sutherland, one of the Defendants, who died in July 1833, that the Plaintiff might, within a Month after the date of the Order to be made on the Motion, re-

(a) See 15th, 16th & 17th Orders of 1833.

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vive the Suit against the Executor, *or*, in default thereof, that the Suit might be dismissed as against the late Duke.

Sir *E. Sugden* and Mr. *L. Lowndes*, for the Motion.

The Plaintiff did not appear.

The *Vice-Chancellor* made the Order.

**LATTER v. DASHWOOD.*

[*462]

1834: 14th February.—*Mortgagor and Mortgagee.—Account.—Rents.*

A. conveyed his Estates to *B.*, in Trust to sell and pay off a Mortgage and other Incumbrances on the Estates, and to retain a Debt due to *B.*, and until the Sale, to apply the Rents in keeping down the Interest on the Charges, and to pay the Surplus to *A.* *B.* took a transfer of the mortgage, and entered into and remained in possession for 24 Years, but did not sell the Estates. For the first Ten Years the Rents were less than the Interest; but, afterwards, they exceeded it. *A.* filed a Bill for an Account of the Rents received by *B.*, with yearly Rests, and for a Re-conveyance of the Estates. But the Court refused to direct the Rests.

By Indentures of the 18th and 19th of December 1798, Freehold and Leasehold Estates were conveyed and assigned, by the Plaintiff, to the Defendant, *Dashwood*, in Trust to sell, and, out of the Money arising therefrom, in the first place to pay off 1,500*l.* and Interest secured by a Mortgage of the Estates to one *Hunt*, next to re-purchase an Annuity of 50*l.*, secured upon the Estates to *Mary Pike*, and then to retain 700*l.* and Interest due to himself, and, to pay the residue of the Monies to the Plaintiff: and it was provided that, until the Sale, the Rents of the Estates should be applied in payment of the Interest of the 1,500*l.*, and in payment of the Annuity and the Interest of the 700*l.*; and that, in case there should be any Surplus, the same should be paid to the Plaintiff. In June 1801, *Dashwood* paid off the Principal and Interest due to *Hunt*, and took a Transfer of the Mortgage. Shortly afterwards he entered into possession of the Estates, but never sold the same.

On the 4th of February 1815, Mrs. *Pike* agreed, with the Plaintiff, to accept of a sum of 808*l.*, in lieu of her Annuity, and that that Sum, with Interest at 5*l.* per Cent., should be considered as charged upon the Estates.

In 1820 the Bill was filed, charging that the Rents received by *Dashwood*, who still remained in possession of the Estates, [*463] were sufficient, not only to keep down the Interest, but to discharge the Principal of the Sums charged thereon, and praying that an Account might be taken of such Rents, with Annual Rests, and that the Estates might be re-conveyed to the Plaintiff.

1834.—*Latter v. Dashwood.*

The Decree, which was pronounced in 1828, directed an Account to be taken of the Principal and Interest due in respect of the Incumbrances, and of the Rents received or which, without wilful Neglect or Default, might have been received by *Dashwood*.

It appeared that, for the first 10 Years after *Dashwood* entered into possession of the Estates, his Payments exceeded his Receipts, and that, in every subsequent Year, his Receipts exceeded his Payments, but not to an amount sufficient to discharge the Principal due to him.

On the Cause coming on for further Directions,

Mr. *Knight* and Mr. *Sharpe*, for the Plaintiff, insisted that Rests ought to be made in taking the Accounts of the Rents received by *Dashwood*.

Sir *E. Sugden* and Mr. *Teed*, for *Dashwood*, said that he did not take possession of the Estates as Mortgagee, but under the Trusts of the Release of 1798; and that the Court could not allow him Interest on the Balances in his favour; and, therefore, that Rests ought not to be made in taking the Account.

The VICE-CHANCELLOR, after stating the Trusts of the Release of 1798, said:

In 1801 *Dashwood* took a Transfer of the first Mortgage and [*464] entered into possession of the Estates under the Provisions of the Release of 1798, and he remained in possession for 24 Years. The Bill asks, in terms, that the Account of the Rents received by him may be taken with Annual Rests.

It was to be inferred, from the Language of the Release, that the Rents were more than sufficient to keep down the Interest on the Incumbrances. But it appears that, for the first 10 Years, they were not equal to the Interest, although there was no Default or Misapplication on the part of the Defendant. Afterwards, however, there was a Surplus.

In *Davis v. May* (a), Sir *W. Grant*, Master of the Rolls, after much Consideration and referring to Precedents, says: "The Direction to take the Account with Rests, is not of course. From Precedents of Decrees that I have seen, I collect that the usual course is not to give that Direction. There is no instance of a Decree in the Form now prayed, with Rests from a particular period of the Account when the Arrear of Interest was discharged. Here the Special Circumstances are against such a Direction; which, it is admitted, would be improper from the beginning of the Account, while there was an Arrear of Interest."

It appears to me, therefore, that I cannot authorize the Account to be taken with Rests, in this Case.

1834.—Mortara v. Hall.

*MORTARA v. HALL.

[*465]

1834: 14th February.—*Infant*.—*Necessaries*.

Where an Infant has an Allowance made to him, by his Guardians for his support, a Tradesman is not entitled to be paid for Articles supplied to the Infant, on credit, unless he can make out that, having regard to the Infant's Circumstances and Station (which he is bound to inquire into), the Articles were Necessaries.

THIS was a Suit for the Administration of the Estate of *James Alexander Nisbett*, who attained 21 in June 1831 and died in the same year.

The Deceased was entitled, under his Father's Will, to Property producing an Income of 2,500*l.*, out of which an Allowance of 500*l.* a year was made to him, for his Maintenance and Support during his Minority. In 1828 his Guardians purchased for him a Commission in the life Guards, the Pay of which amounted to 146*l.* per annum; and they allowed him 800*l.* for Outfit.

Two Hosierys, *Ludlam* and *Hills*, claimed, under the Decree, to be Creditors of the Deceased for the Amount of their Bills for Shirts, Gloves, Stocks, Handkerchiefs and other Articles with which they had profusely supplied the Deceased, between November 1828 and June 1829.* The *Master* allowed about half the Amount of each Bill. The Deceased's Widow then presented a Petition contending that the *Master* ought to have disallowed the whole Amount of the Bills, and praying that it might be referred back to the *Master* to review his Report.

Sir *E. Sugden* and Mr. *Wakefield* for the Petitioner:

It lies on the Tradesman who supplies an Infant with Goods, to show that they are Necessaries. The Articles which these Tradesmen supplied were, not necessaries. They had nothing to do with the Infant's Outfit as an *Officer. A Tradesman cannot recover even for Necessaries, if another Tradesman has supplied the Infant with the same Articles, although he may be ignorant of that fact. Here the Articles charged for were furnished by the two Tradesmen concurrently. *Ford v. Fothergill* (a), *Bainbridge v. Pickering* (b), *Maddox v. Miller* (c), *Cook v. Deaton* (d), *Berolles v. Ramsay* (e).

Mr. *Knight* and Mr. *K. Parker* for *Ludlam*, said that this Case was different from any that had been decided: that it was not the Case of an Infant living in his Father's House; but of a Young Man placed out in the World, holding a Commission in the Army, and who was left by his Trustees

(a) 1 Peake's N. P. C. 301. S. C. Esp. N. P. C. 211. (b) 2 Judge Black. 1325.

(c) 1 M. & S. 738. (d) 3 Carr. & Payne, 114. (e) Holt's Rep. 77.

* Two hundred and nine pairs of Gloves, besides Ladies' Gloves, were charged for in *Hill's* Bill.

1834.—*Mortara v. Hall.*

and Guardians in the situation of a Man having the spending of his own Income.

Mr. *Stinton* for *Hills*.

The VICE-CHANCELLOR:

I take it to be the Law, that it is the duty of those who trust Infants for Goods supplied to them, to make themselves acquainted with their Circumstances, in order that they may determine whether the Articles supplied really are Necessaries or not. In this Case, the Trustees, in 1827, had allowed the Infant 500*l.* a year, and, in 1828, they purchased for him a Commission in the Life Guards, and furnished him with 800*l.* for outfit. The Question then is whether a tradesman would be at liberty to furnish an Infant with Necessaries on Credit, when he might have known, if [*467] he had made Inquiry, that the Infant was supplied with an Income for his own Support. I cannot think that a Tradesman would be at liberty to supply an Infant so circumstanced, on Credit.

With respect to *Hill's* Bill, it is nothing but sheer extravagance and folly. It appears that, between December 1828 and June 1829, he supplied this Young Man with 209 Pairs of Gloves, and with many other Articles which it is impossible that a Life Guardsman could want. And my opinion is that no Jury would be justified in giving him one farthing for that Bill.

With respect to *Ludlam*, he states, in his Affidavit, that he observed to *Nisbett*, that he could not supply him with the Articles he wanted, on Credit, by reason of his Minority; and that *Nisbett* replied that he was going into the Life Guards and required the Articles for his Outfit, and that he would pay for them out of the Money which was to be allowed him for that Purpose. When that Answer was given to *Ludlam*, it was his duty to make further Inquiry, and he then would have learnt what Sums were allowed to this Young Man for his Support and also for his Outfit; and, on those Facts being stated to him, he would not have been at liberty to supply this Young Man with all these Articles as Necessaries.

The Law with respect to Infants, was made for their Protection; and I am of opinion that a Tradesman who sues for Payment of a [*468] Bill for Articles supplied to an Infant, is bound to make out that, having regard to one Situation of the Infant, those Articles were Necessaries.

On what I now see with regard to these Bills, I am of opinion that they ought not to be allowed.

1834.—Lowndes v. Davies.

LOWNDES v. DAVIES.

1834: 15th February.—*Pleading*.—*Cross-Bill*.—*Discovery*.

A. being in possession of an Estate under a Decree in 1783, *B.* filed a Bill against him to recover the Estate, and brought a Writ of Right for the same purpose; *A.* then filed a Cross Bill against *B.*, seeking for a Discovery of Matters relating to *B.*'s Pedigree, and praying *B.* might elect whether he would proceed at Law or in Equity, and that, if he elected the former, that he might be perpetually restrained from proceeding at Law to recover the Estate. *B.* demurred, because the Bill sought a Discovery of Matters constituting his Case at Law, and because the Order for putting him to his Election ought to be obtained on Motion, and not at the Hearing. Demurrer over-ruled.

THOMAS JAMES SELBY devised his Real Estates in *Buckinghamshire*, to his Heir-at-Law, for the finding out of whom he directed Advertisements to be published immediately after his Death; but, if no Heir should be found, he devised the Estates to *William Lowndes*, subject to his Debts, Legacies, &c.

The Testator died on the 7th of December 1772. After his death Advertisements were published pursuant to the direction in his Will, and several Persons claimed to be his Heirs. On the 28th of October 1773, *William Lowndes* filed his Bill against those Claimants, praying that the Will might be established, and that Issues might be directed, between himself and the Claimants, to try who was the Testator's Heir, and, if it should be found that the Testator left no Heir, then that he might be declared entitled to the Estates. The Cause was *heard on the 23d of [*469] April 1779, when it was ordered that the Claimants should be at liberty to bring an Ejectment to recover Possession of the Premises. The Action was tried on the 22d of April 1780, when a Verdict was found for *W. Lowndes*, the Defendant in the Action. On the hearing of the Cause for further Directions, on the 28th of March 1783, the Will was established and the Trusts were ordered to be performed, and it was declared that the Estates were to be considered as belonging to *W. Lowndes*, and that he should be let into Possession thereof, and that the Title-Deeds should be delivered to him.

Lowndes accordingly, entered into Possession of the Estates and remained in Possession till his death. In Trinity Term 1784, he levied a Fine *sur conuzance de droit come ceo* &c. of the Estates, with Proclamations, the last of which was made prior to June 1785, and thereby, the Bill alleged, he became seized, in his Demesne as of Fee, of the Estates. *William Lowndes* died on the 3d of May 1813, leaving *William Selby Lowndes* his eldest Son and Heir, who, thereupon, entered into and had ever since continued in Possession of the Estates.

On the 6th of December 1832, *T. Davies* and *Elizabeth* his Wife, in her

1834.—Lowndes v. Davies.

right, issued a Writ of Right against *W. S. Lowndes*, to try their Right to the Estates, and, on the same day, they filed a Bill against him, stating the Will, the Proceedings in the former Suit, that neither they nor any Ancestor through whom *Elizabeth Davies* claimed, were Parties to that Suit, and that they had lately discovered, upon Investigation of *Elizabeth* [*470] *Davies's* Pedigree, that she was the *Testator's Heir: and the Bill prayed that it might be declared that *E. Davies*, as such Heir, was entitled to the Estates, and that *W. S. Lowndes* might deliver up Possession thereof to her, and account to her for the Rents; or that an Issue might be directed to try whether she was the Testator's Heir, or that, notwithstanding the Decree in the former Suit, she might be at liberty to proceed, at Law, to recover Possession of the Estates.

The Count delivered by *Davies* and Wife in the Writ of Right, alleged that *Erasmus Lloyd* was the Testator's Heir at his death. It then traced *Erasmus Lloyd's* Pedigree, and averred that, on his death, the Right to the Estates descended to *John Lloyd* his Son and Heir, from whom it descended to *Catherine, Frances and Mary*, his three Daughters and Co-heirs, and, from them, to *Elizabeth Davies*, who was the Daughter of *Catherine*.

The Bill in this Cause, which was filed on the 10th of June 1833 by *William Selby Lowndes* against *Davies* and Wife, after stating as above, alleged that, if the Allegations in the Count were true, *Davies* and Wife had no Right to the Estates, inasmuch as it was too late for them to claim any Interest under the Will, as they were barred by Length of Time and by the Fine and Nonclaim. The Bill then contained Charges as to *Erasmus Lloyd* and his deceased Descendants having been within the Realm and under no Disability, and as to the Periods of their Deaths, in order to show that they were not exempted from the operation of the Statute of Limitations or of the Fine and Nonclaim; and, for the same purpose, it required the Defendants to set forth the Times of the Births and Deaths, and the [*471] *Places of Residence of *Erasmus Lloyd* and his deceased Descendants, and other Particulars relating to them, and when *Elizabeth Davies* was born, and when she and her Husband were married, and where they had, from time to time, resided; and also to set forth a Schedule of all Deeds, Pedigrees and other Documents in their Possession relating to the Matters aforesaid: and it prayed that the Defendants might be ordered to elect whether they would proceed in their Suit in Equity or at Law, and, if they should elect to do the former, or, if the Court should be of opinion that the Merits of the Case required it, that they might be perpetually restrained from proceeding in their Action at Law, and from in any manner, disturbing the Plaintiff in the Possession of the Estates.

The Defendants answered those parts of the Bill which preceded the

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Allegation as to the Delivery of the Count in the Writ of Right; but they demurred to the Discovery sought by the rest of the Bill, and also to so much of the Bill as sought that they might be ordered to elect whether they would proceed at Law or in Equity, and to all the Relief *consequent upon such Election*, the Plaintiff, on his own showing, not being entitled to such Order or Relief.

Mr. *Pepys*, Mr. Serjeant *Stephen* and Mr. *Spence*, in support of the Demurrer, said that the Answer gave all the Discovery, that was necessary for obtaining the Equitable Relief sought by the Bill, namely, the Perpetual Injunction: that the rest of the Discovery was sought, not with a view to the Equitable Relief, but to the Plaintiff's Defence to the Writ of Right, and either was immaterial, or related to the Defendants' Pedigree and other Particulars of their Case, which they must prove at [*472] the Trial of the Writ of Right: that an Order for a Plaintiff to elect whether he would proceed at Law or in Equity, was never prayed for by the Bill and was not a subject of Relief, but ought to be obtained, by Motion, on the putting in of the Answer to the original Bill; and, consequently, that, though the Plaintiff might, on his Equitable Case, be entitled to the Perpetual Injunction, he could not be entitled to it *as consequential* to the Election irregularly prayed by the Cross Bill.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Parry* appeared in support of the Bill:

But The VICE-CHANCELLOR without hearing them, said:

I confess that this is the first instance I have ever seen of a Bill filed under such circumstances, or of a Bill asking that a Plaintiff in Equity might be put to his Election whether he would proceed at Law or in Equity. But, having regard to the Case which is stated, I think that it was very judicious, in Mr. *Lowndes*, to file this Bill, because it enables him to extort, from Mr. and Mrs. *Davies*, an Answer as to every Fact which can be brought forward by them to sustain their Case at Law, it being admitted that the Case by which they are to succeed at Law, is the identical Case by which they are to succeed in Equity. And, if a Person will file a Bill, he is, of course, exposed to the ordeal which the Defendant may subject him to by filing a Cross Bill; and he is then bound to set forth an Answer to all the matter which concerns his Title; for the truth of the matter which concerns his Title, is material to the Defendant's Defence [*473] in Equity.

With respect to those Allegations which relate to certain matters regarding the Plaintiff's Title, I think that the Defendant has a right to file a Cross Bill to know whether they are true or false: and, though it may seem to be immaterial to ask whether the Count had been delivered, it is a ques-

 1836.—*Lee v. Ravenscroft.*

tion that leads to that which is material, namely, the truth or falsehood of the Averments in the Count.

With respect to the Objection that Mr. *Lowndes* has prayed that Mr. and Mrs. *Davies* may elect whether they will proceed at Law or in Equity; although it is usual to obtain an Order for that purpose, on Motion, yet, in this Case, Mr. *Lowndes* appears to have a manifest advantage in allowing the Original Suit to go on to a hearing, and then to put the Plaintiffs in that Suit to their Election. And I am of opinion that this Relief which the Plaintiff in this Suit seeks, is a Relief which he is *primâ facie* entitled to have, and therefore that the Demurrer must be over-ruled.

 DESANGES v. GREGORY.

1836: 6th February.—*Practice.*—*New Orders.*

Where a report of Scandal or Impertinence has been excepted to, the *Master* cannot tax the Costs of the Reference, under the 22d Order of 1833, without further Order.

EXCEPTIONS taken to the Answer, for Impertinence, had been allowed by the *Master*. The Defendant excepted to the Report, and those Exceptions were allowed. The *Master*, on being applied to, declined to tax [*474] the Costs of the Reference, on the ground that, *as the Report had been excepted to, he had no Authority, under the 22d Order of 1833, to tax the Costs of the Reference without further Order.

Mr. *Toller*, for the Defendant, now moved that the *Master* might be ordered to tax the Costs.

The *Vice-Chancellor* agreed with the *Master*, and made the Order.

 LEE v. RAVENSCROFT.

1836: 6th & 8th February.—*Practice.*—*New Orders.*—*Injunction.*

Under the 10th Order of 1833, the Common Injunction cannot be obtained on an Amended Bill until Five Weeks after Appearance, and, if the Defendant is then in default, the Application must be made according to the old Practice.

In this Cause, the Common Injunction had been obtained; and, on the coming in of the Answer, it was dissolved, no Cause having been shown. The Plaintiff then amended his Bill; and the Defendant not having put in either a Plea, Answer or Demurrer within Eight Days after Appearance, a

1834.—In re Barker.

Motion, on Notice, was now made for an Injunction on the Amended Bill, the Amendments being verified by Affidavit.

Mr. *Knight* and Mr. *Mylne*, for the Plaintiff, referred to *James v. Downes* (a), and *Home v. Watson* (b).

Mr. *Jacob* and Mr. *K. Parker*, for the Defendant, said that the Defendant was not in Default, as the Five Weeks allowed by the 10th Order of 1833 (this being a Town Cause) for the Defendant to answer the Amended Bill, had not expired: that the Five Weeks were substituted for the Eight Days allowed, by the same Order, to "answer the ori- [*475] ginal Bill: that an Injunction on an Amended Bill, could not be obtained, *as of course*, and, therefore, that part of the Order which entitles a Plaintiff to an Injunction in case the Defendant do not plead, answer or demur within Eight Days after Appearance, could not apply to an Amended Bill.

Mr. *Knight*, in reply, said that the Five Weeks were substituted for the Eight Weeks allowed to answer an Original Bill: that neither the Eight Weeks, nor the Five Weeks, were intended to apply to an Injunction Cause: that it would be monstrous to hold that a Plaintiff must wait Five Weeks before he could apply for an Injunction: that the words, "as of course," meant on complying with those Conditions which are required by the old Practice as laid down in the Cases cited.

The *Vice-Chancellor* said that the 11th Order pointed out the particular Recital to be inserted in the Order for an Injunction on an Original Bill; and that it seemed to him that the Injunction to which the 10th Order referred, was also an Injunction to be obtained on an Original Bill; but that he would consult The *Lord Chancellor* on the question.

The *Vice-Chancellor* said that he had conferred with the *Lord Chancellor*, and that his Lordship was of opinion that the 10th Order applied only to Injunctions to be obtained on Original Bills; and that a Plaintiff, before he could obtain an Injunction on an Amended Bill, must wait till the Five Weeks had expired, and then, if the Defendant was in Default, he might move for the Injunction according to the old Practice.

*IN THE MATTER OF BARKER.

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1834: 14th July and 29th August.—*Solicitor and Tenant.*

If a Solicitor retains Money received by him in his character of Solicitor for the use of his

(a) 18 Ves. 522.

(b) *Ante*, Vol. II. p. 85.

1834.—In re Barker.

Client, his Bill is taxable, though it contains no Charges for Business done in a Court of Law or Equity.

Items in a Solicitor's Bill for preparing and settling a Bill in Equity, will render the Solicitor's Bill taxable, though the Bill in Equity was never filed. *Semble*.

In 1828 *J. W. Ryle* and certain other persons jointly employed *Henry Barker* of *Manchester*, Attorney at Law and a Solicitor of the Court of Chancery, to act as their Solicitor in obtaining for them Payment of certain Legacies to which they were entitled under a Will; and, at the same time, it was fully understood that his Bill of Costs was to be paid by them jointly. The Legatees, afterwards, authorized *Barker* to file a Bill in Equity, against the Executors of the Testator, to compel them to account for the Testator's Estate. *Barker*, accordingly, caused a Bill to be prepared and signed and settled by Counsel; but, in consequence of the death of one of the Executors, the Bill was never filed. The Claims of the Legatees were, afterwards, referred to Arbitration, and 1,427*l.* 13*s.* was awarded them. That sum was received by *Barker*, and he paid over 635*l.* 5*s.* 6*d.* to the Legatees, and retained the remainder in his own hands. The Legatees continued to employ *Barker* as their Attorney and Solicitor, in the investigation of the Title and preparing the Conveyances of Estates bought by them from the Trustees of the Testator's Will.

In January 1833 *Barker*, after repeated Applications had been made to him, delivered certain Bills of Costs against all the Legatees jointly, and, in May following, he delivered a separate Bill against *J. W. Ryle* alone, in which were contained the Charges relating to the preparing, settling and signing the Bill in Equity. The Legatees, on a Petition stating [*477] that those Charges ought to have been charged against them jointly, and not against *J. W. Ryle* alone, obtained the usual Order for taxing the Bill of Costs.

Barker having applied to stay the Proceedings under the Order and that the Petition might be again set down to be heard:

Mr. *Knight* and Mr. *Spence*, for the Legatees:

The Bills contain Charges for preparing a Bill in Chancery; and the Rule is that, where a Solicitor has done Business which is referrible, purely, to his character of Solicitor, though no Suit has been instituted, the Court exercises Jurisdiction over his Bills and directs them to be taxed. *Luxmore v. Lethbridge* (a); *Sandom v. Bourn* (b); *Weld v. Crawford* (c). Where an Attorney or Solicitor withholds his Client's Documents or Money, the Courts exercise a Summary Jurisdiction over him. *Ex parte Aitkin* (d); *The Earl of Uxbridge's Case* (e); *Murray's Case* (f).

(a) 5 Barn. & Ald. 898.

(b) 4 Campb. N. P. C. 68.

(c) 2 Stark. N. P. C. 538.

(d) 4 Barn. & Ald. 47.

(e) 6 Ves. 425.

(f) 1 Russ. 519.

1834.—In re Barker.

Sir *Edward Sugden* and Mr. *Duckworth*, for *Barker*, said that the Bills contained Charges for Business done towards a Suit ; but that, as the Bill in Equity was not filed, no Business had been done in a Court of Equity, and, consequently, the Bills were not taxable under 2 Geo. 2, c. 23. *Sandom v. Bourn* and *Weld v. Crawford* were overruled by *Burton v. Chatterton* (g).

*The discussion in *Wardle v. Nicholson* (h), as to whether [*478] there was any proceeding in the Replevin, would have been idle if the Court had any general jurisdiction to direct the Bills to be taxed. There the Bonds were executed ; but the Court thought itself bound to see whether any Proceeding had been had in a Suit. That Case and *Burton v. Chatterton* are conclusive that Charges for Acts done towards a Suit, do not make the Bill taxable. If the Court could have taxed the Bills by force of its general Jurisdiction, the Act of Parliament would have been useless. *Cocks v. Harman* (i), and *In the Matter of Lowe* (k), show that the general Jurisdiction of the Court does not exist. *Wilson v. Gutteridge* (l) was over-ruled by *Dagley v. Kentish* (m).

The VICE-CHANCELLOR : *

In this Case it appears, upon Affidavits not contradicted, that Mr. *Barker* was employed, by the Petitioners jointly, to prepare a Bill in Equity ; and he has delivered a separate Bill against one of them, in which are various items relating to the instructions for the Bill and the drawing of it. That Bill of Costs should have been made out against all the Petitioners, and ought to be considered as a Bill against them. A Bill was drawn and settled and signed by Counsel, but never filed. But, in pursuance of an Arbitration, 1,427*l.* 13*s.* was paid to Mr. *Barker* as the Solicitor or Attorney for the Petitioners. Out of that Sum he has *paid [*479] them only 635*l.* 5*s.* 6*d.* After that, *Barker* did other Business for some of the Petitioners, and has delivered Bills of Costs ; and, upon Petition, the Common Order for Taxation has been obtained : and I am asked, upon Motion, to stay Proceedings on the Order, because there was no taxable item in the Bills ; and because, without such an item, it is said the Court has no general Jurisdiction to direct a Taxation.

It does not appear to me necessary to decide the latter point. There is, certainly, very strong authority to show that the Court has general Jurisdiction in a Case not within the 2 G. 2, c. 23, s. 23. The Case of *Dag-*

(g) 3 Barn. & Ald. 486.

(h) 4 Barn. & Adol. 469.

(i) 6 East, 404.

(k) 8 East, 237.

(l) 3 Barn. & Cress. 157.

(m) 2 Barn. & Adol. 411.

* His Honor delivered his Judgment in writing, after the Court had risen for the Long Vacation.

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ley v. *Kentish* (n) has, I admit, thrown a doubt over the reason assigned for the decision in *Wilson v. Gutteridge* (o). But, supposing the reason to be wrong, still the Decision may be right; as, in that Case, one of the Charges was for drawing a Warrant of Attorney: See *Sandom v. Bourn* (p) and *Weld v. Crawford* (q), in both of which Cases an item for drawing a Warrant of Attorney, was held to make the Bill taxable. In *Cocks v. Harman* (r) it did not appear that the Documents had been delivered to *Harman* in his character of Attorney: and it seems that the Decision in the Matter of *Lowe* (s) was wrong, because the Lease was put into *Lowe's* hands in his character of Attorney, and therefore, according to The Earl of *Uxbridge's* Case (t) and *Murray's* Case (u), the Court had Jurisdiction. It seems to me that, if the item of drawing a [*480] Warrant of Attorney, makes the Bill taxable, although no Judgment is entered up in pursuance of it, the item of drawing a Bill in Equity, will, also, make the Bill taxable, though the Bill be not filed. In both Cases the preliminary step is taken to proceeding at Law or in Equity. Therefore, on that ground, I think *Barker's* Bills are taxable, or at least one of them. I take it to be settled Law, notwithstanding *Lowe's* Case, that, if the Attorney has his Client's Deeds in his hands, the Court will tax his Bill; and I see no substantial distinction between having the Client's Deed and having the Client's Money: for the Deed is of no other value than the subject to which it relates. Therefore, without the authority of *Ex parte Aitkin* (x), I should have thought the Bills taxable. But *Ex parte Aitkin* is an express Authority that the Court will tax the Attorney's Bill, who, in his character of Attorney, has possession of his Client's Money, though he has not possession of his Client's Deeds. Therefore, the Motion must be refused and with Costs: for I do not see upon what fair ground the taxation of the Bills should be opposed.

(n) 2 Barn. & Adol. 411.

(o) 3 Barn. & Cress. 157.

(p) 4 Campb. N. P. C. 68.

(q) 2 Stark. N. P. C. 538.

(r) 6 East, 404.

(s) 8 East, 237.

(t) 6 Ves. jun. 425.

(u) 1 Russ. 519.

(x) 4 Barn. & Ald. 47.

END OF PART III. VOL. VI.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

STANSBURY v. ARKWRIGHT.

1834 : 15th February.—*Pleading.—Outstanding Terms.*

Demurrer allowed to a Bill to prevent the setting up of Outstanding Terms, as it alleged, merely, that the Defendant threatened to set up some Outstanding Term. Such a Bill ought to state that there are such Terms and what is the nature of them.

THE Bill (which was filed in January 1834) stated that *Thomas Stansbury*, being, in his lifetime and at his death, seised of the Lands after mentioned, by his Will dated the 12th of February 1767, devised his Lands in the Parish of *Leominster*, to his Wife for life, and, after her decease, to his Brother, *Samuel* and Heirs of his body : that the Testator died in January 1771, and, his Wife having died in his life-time, *Samuel Stansbury*, upon the Testator's death, took possession of and became seised of the devised Premises, as Tenant in Tail under the Will, and continued to be so seised until his decease : that *Samuel Stansbury* died in or about 1793, leaving *Joseph Stansbury*, the Plaintiff's late Grandfather, his eldest Son and Heir in Tail, and who then resided in *America* ; and, upon *Samuel Stansbury's* death, some Person claiming or pretending to claim under his Will, took possession of the Premises ; and that *Joseph Stansbury*, who continued to reside in *America* until his death, never took possession of the Premises : that he died in 1809, leaving *Samuel Stansbury* his eldest Son and Heir in Tail, and *who also then [*482] resided in *America* and continued to reside there until his decease : that he died in 1822, leaving the Plaintiff his eldest Son and Heir in Tail and who also then resided in *America* and continued to reside there until December 1824, when he arrived in this country, and had been since naturalized by Act of Parliament : that the Plaintiff, on his arrival, found the Defendant in possession of the Premises and that he claimed to be entitled thereto under some Title derived from some Person claiming under cer-

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tain Indentures of Lease and Release executed by the plaintiff's Grandfather, but that the Entail created by the Will, had never been barred or discontinued : that the Plaintiff being seised of or entitled to the Premises, as Heir in Tail under the Will, he, soon after his arrival in this country, brought an Ejectment against the Tenant in possession of the Premises, but, by reason of the absence of material Witnesses to prove his Pedigree and from other causes, he was unable to bring his Action to Trial until the then last Spring Assizes for *Herefordshire* : that, at the Trial, the Plaintiff made out his Pedigree as Heir in Tail of *Samuel Stansbury*, the Testator's Brother, but, by reason of the lapse of time since the Testator's death, he was unable to prove the Seisin of the Testator and his Brother, and he was nonsuited, although the Defendant knew or had reason to believe, and, in fact, did believe that the Testator was, at the making of his Will and at his decease, seised of the Premises, and that *Samuel Stansbury* was and continued in the Seisin and Possession of the Premises, as first Tenant in Tail thereof under the Will, until his decease ; but that the Defendant refused to admit the same, although, at the time he purchased the Premises, he took

[*483] and still held some indemnity against the Claims of the Plaintiff or of the Party entitled under the Entail : that the Plaintiff had lately commenced another Ejectment against the Tenant in possession under the Defendant : that the Defendant threatened to set up some Outstanding satisfied Terms of Years, or other legal Estate or Interest in the Premises, in bar to the Plaintiff's right to recover possession of the said Premises in his then pending action of Ejectment : that the defendant had, in his custody, Deeds, &c. relating to the Matters aforesaid, and particularly to the Seisin of the Testator and his Brother ; and that the Plaintiff could not safely proceed to Trial without a discovery of such Matters. The Bill prayed for a discovery, and that the Defendant might be restrained from setting up any Outstanding satisfied Term or other legal Estate, in bar to the then pending Action.

The Defendant put in a general Demurrer.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Wigram*, in support of the Demurrer :

An Order restraining a party from setting up Outstanding Terms in bar to an Ejectment, is relief which can only be had at the hearing of the Cause. *Hylton v Morgan* (a) ; *Aston v. Lord Exeter* (b) ; *Northey v. Pearce* (c) *Barney v. Luckett* (d). A Plaintiff, therefore who seeks such relief, must state, upon his Bill, a case upon which, if admitted by the

[*484] Answer or proved at the hearing, the Court could make a *Decree.

(a) 6 Ves. 293.

(c) 1 Sim. & Stu. 420.

(b) Ibid. 288.

(d) Ibid. 419.

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A mere surmise that the Defendant intends to set up Outstanding Terms, not alleging that there are any such, or suggesting any reason why the Defendant is unable to state the facts relating to those Terms, is insufficient. *Jones v. Jones* (e); *Barker v. Hunter* (f); *Frietas v. Dos Santos* (g). If a Bill to restrain the setting up of Outstanding Terms is properly framed, the Defendant may plead that there are no such Terms. *Armitage v. Wadsworth*. (h) In this Case such a Plea would not be *ad idem*; for the Bill does not allege there are any Outstanding Terms, but only that the Plaintiff threatens to set up some Outstanding Term. Consequently, the Plea must be that the Defendant does not threaten or intend to set up any Outstanding Term; which would be absurd.

If the Plaintiff is not entitled to the relief prayed by his Bill, he is not entitled to the Discovery.*

Mr. Pepys and Mr. Ching for the Bill:

The allegation that the Plaintiff threatens to set up Outstanding Terms, implies that they exist, and the Defendant, by demurring to the Bill, has admitted that he does threaten to set them up. In *Jones v. Jones*, there was no statement from which it could be inferred that there were any Outstanding Terms. The Bill merely prayed that the Defendant might be restrained from setting up any Outstanding Term.

*The VICE-CHANCELLOR:

[*485]

The bill does not allege that there is any outstanding Term or Estate; but, merely, that the Defendant threatens to set up some Outstanding Term or other Legal Estate. Moreover a Plaintiff who seeks to restrain a Defendant from setting up an Outstanding Term or Estate, ought to state, in his Bill, what sort of a Term or Estate it is. For an Outstanding Term or Legal Estate may be such as to make it impossible for the Plaintiff to recover in Ejectment. If, for instance, in this Case the Legal Fee was not vested in the Testator when he made his Will, the Plaintiff, on his own showing, could not recover in Ejectment.

Demurrer allowed.

(e) 3 Mer. 161.

(g) 1 Youn. & Jer. 574.

(f) Ibid. 170, cited

(h) 1 Madd. 189.

* The Defendant's Counsel also contended that the Plaintiff was an Alien, and that his right to file the Bill was barred by length of time. See *Cholmondeley v. Clinton*, 1 Turn. & Russ. 107.

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PORTER v. FOX.

1834: 17th February.—Will.—Construction.—Remoteness.

Testator gave Annuities to his Widow and Son, and directed the surplus of his Personal Estate and the Rents of his Real Estate to be invested in Stock, and the Dividends to be accumulated, and to be and remain Assets for improvement, in the hands of his Executors, until the time and times should arrive when distribution should be made, as thereby directed. The Testator then directed his Real Estates to be sold after the decease of the survivor of his Wife and Son and the Proceeds to be invested in Stock, and the Dividends to be accumulated, to be and remain Assets for improvement in the hands of his Executors, for the benefit of his Grandchildren and his Nephew *T. O.* and to be distributed as they should become of the age of 25 years. The Testator had Two Grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the Testator's death who was an Infant when the Bill was filed. *T. O.* survived the Testator and attained 25. Held that the Bequest was void for Remoteness.

WILLIAM PORTER, by his Will dated the 3d of April 1807, [*486] gave to Trustees, whom he also appointed his Executors, all his Real and Personal Estate, upon trust to secure, support and maintain the several Contingencies therein mentioned or referred to, with full power to Lease all the said Estates and to take the Rents and Profits thereof to maintain the several contingent Expenditures thereby bequeathed and appointed, and the Surplus thereof to be disposed of in the manner thereby directed, *and to be and remain Assets, in their hands, for improvement until the time and times should arrive when distribution should be made as thereby directed*: and he gave to his Wife, *Elizabeth Porter*, for her life, an Annuity of 160*l.* to be paid out of his Real and Personal Estates, and, after the decease of his Widow, he gave to his Son, *William Porter*, for his life, an Annuity of 80*l.*: and he directed that, after payment of the Annuities, at the expiration of every year or as soon as convenient, such Surplus as should happen to arise, annually, from time to time, out of his Real and Personal Estate, should, annually, during the lives of his Widow and Son, be placed out by, by his Executors and Trustees, in the Funds, and the Dividends, together with all the preceding Dividends that were due and Rents that might be collected up to the end of the year, should, annually, be laid out, by his Executors, in some such Capital Stocks in some or one of the Public Funds, to be and remain Assets, for improvement, in the hands of his Executors and Trustees for the benefit of such surviving Child or Children as aftermentioned.

And the Testator ordered that, at the decease of his Widow, all his Household Furniture, Beds, Bedding, Plate, Linen, China and all other Furniture and Implements of housekeeping, should be sold, and the Money

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arising from such sale to be placed out as aforesaid, to be and remain Assets for improvement as aforesaid; and, at the de- [*487]
 cease of the longest liver of his Widow and Son, or as soon as conveniently might be afterwards, he directed his Trustees and Executors to sell all his Real Estate, and, with the money arising therefrom, to purchase more Stock as aforesaid, as far as it would go, to be and remain Assets for improvement in the hands of his Executors and Trustees *for the benefit of his Grandchildren and his Nephew, Thomas Owen, and to be distributed in manner and form following, that is to say, as they should become of the age of 25 years respectively*: and he directed that his Trustees should, as soon as any one of his said Grandchildren and Nephew should arrive at the age of 25 years, transfer so much of the Capital Stock, so purchased as therein directed, as should amount to an equal Part or Share according to the number of such Children as should be then living; and, as soon as the next surviving Child should arrive at the age of 25 years, then he directed his Executors and Trustees to transfer another equal Share of such Capital Stock then remaining, including the improvements, as should amount to an equal Share according to the number of the then surviving Children that should not before have had his or her preceding portion, and so on to the last; and, as soon as the last should arrive at the age of 25 years, he or she should have transferred to him or her the rest and residue of the whole Capital stock so remaining, with all Interest or Dividends due thereon and all Profits and Accumulations whatsoever thereunto belonging since the last transfer: but, in case the last survivor should die before he or she should arrive at the age of 25 years, if he or she should have a Child or Children, or leave one or more lawfully begotten *in ventre sa mere* and born alive, such child or Children should be entitled to his, her or [*488] their Father's or Mother's Residue, and the Father and Mother of such child or children, or his or her lawful Representative, should take the Dividends or Interest of such Residue towards his, her or their maintenance and bringing up to maturity or age of 21 years; but, for want of such succession in Issue at the expiration of one year after the decease of the last-mentioned Legatee, such Residue should go among the other Legatees or their lawful Representatives, to be equally divided among them share and share alike.

The Testator died on the 8th of April 1807, leaving *Elizabeth Porter* his Widow, and *William Porter* his only child and Heir at Law him surviving. *William Porter* the Son had two children born in the Testator's lifetime, both of whom died infants and unmarried, one of them in the Testator's lifetime, and the other, shortly after his death. The Plaintiff, who was the Daughter of *William Porter* the Son, was the only other Grandchild of the

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Testator. She was born in August 1808. *Thomas Owen* was an illegitimate Son of the Testator's Sister: he was born in 1788, and died, intestate, in 1818. The Testator's Widow died intestate in 1814. The Plaintiff's Father and Mother also died intestate, the former in 1819, and the latter in 1828; and the Plaintiff obtained Letters of Administration to them and to the Testator's Widow.

The Plaintiff, by the original Bill, which was filed during her infancy, against her Mother, (who was then alive) and the Executors of the Testator, claimed the whole of the Testator's Real and Personal Estate and the accumulated Rents of his Real Estate, as the Heir and sole next [*489] of Kin of her Father and the Testator, "subject to such Claims as her Mother might have thereon.

She afterwards filed a Supplemental Bill against the *Attorney-General*, stating that he alleged that, as *Thomas Owen* was a Bastard and lived to attain 25 and afterwards died Intestate, all his Interest in the Testator's Real and Personal Estate had become vested in the Crown.

The Cause now came on to be heard for further directions.

Mr. *Pepys* and Mr. *Spence*, for the Plaintiff, contended that the Trust declared, by the Will of the Produce of the Testator's Real and Personal Estate, was Void for Remoteness, according to *Leake v. Robinson* (a).

The *Attorney-General* and Mr. *Wray* for the Crown:

In the Will, there is a direct Gift of the Property to the Grandchildren; therefore, those only who were living at the Testator's death were intended to take.

[The *Vice-Chancellor* :—The distribution is part of the Gift; and the distribution is to be amongst all the Grandchildren.]

If all the Grandchildren are to be let in, the Will does not postpone the vesting of their shares until they attain 25; but their shares are vested, subject to be divested on their dying under 25. There is, first, a Gift of the Property for the benefit of the Testator's Grandchildren [*490] and his Nephew *Thomas Owen*, and then the time of distribution follows, in a separate sentence. If the Grandchildren do not attain 25, their shares are divested.

Should the Court be against us on these points, we submit that, at all events, *Thomas Owen* was entitled to a share. We do not question the doctrine laid down in *Leake v. Robinson*. There, no Person was named. The Persons intended to take were a Class, constituting one Devisee.

Here the Grandchildren are the Class, *inter se*. *Owen* is not a Member of the Class. The Clauses of Distribution and Survivorship affect the Grand-

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children only: *Owen's* name is not mentioned in them. If he had been intended to be one of the Class, his name would have been mentioned in those clauses. The Testator clearly intended *Thomas Owen* to take; and, if he had been named by himself, he, clearly would have taken. Therefore, the difficulty in *Leake v. Robinson* does not occur in this case. Does it follow, because he is named with Persons whose Legacies are void for remoteness, that he is not to take? Notwithstanding the Legacies to the Grandchildren are void, the number of the Grandchildren ought to be ascertained, in order to fix the share which *Owen* is to take.

Sir *E. Sugden* and Mr. *Lynch* appeared for the other Defendants.

The VICE-CHANCELLOR:

As it is the wish of the Parties that I should give my Opinion on this Will, I must hold that the Trust for the *benefit of the [491] Testator's Nephew and Grandchildren is, altogether, void.

The Testator, after giving Annuities to his Wife and Son, directs the Surplus Income of his Real and Personal Estate to be invested annually in the Funds, and the Dividends to be laid out, in like manner, to be and remain Assets for Improvement in the hands of his Executors and Trustees, for the benefit of such surviving Child or Children as after-mentioned. That is the first sentence in which he alludes to the Persons who are ultimately to take; and he alludes to them as a Class, without mentioning any Child or Children of his Sister or of his Son. Then he directs his Trustees and Executors, at the decease of his Wife, to sell his Household Furniture, Beds, &c., and the Money arising therefrom to be placed out as aforesaid, to be and remain Assets for Improvement as aforesaid; and, at the decease of the Survivor of his Widow and Son, to sell his Real Estates, and, with the Money arising therefrom, to purchase more Stock as aforesaid, to be and remain Assets for Improvement in the hands of his Executors and Trustees, for the benefit of his Grandchildren and his Nephew, *Thomas Owen*. There, it is true, he names one individual, and describes others as if they constituted a Class; but he speaks of the same Persons as he had previously referred to as a Class. Then he says: "And to be distributed in manner and form following, that is to say, as they shall become of the age of 25 years respectively: And I do hereby order and direct that my said Trustees shall, as soon as any one of them my said Grandchildren and Nephew shall arrive at the age of 25 years, transfer so much of the Capital Stock, so *purchased as herein directed, as shall [492] amount to an equal Part or Share according to the number of such Children as shall be then living." He there uses the word *Children* as comprehending the Children of his Son and also the Child of his Sister. And then he directs his Executors and Trustees, as soon as the next surviv-

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ing *Child* should attain 25, to transfer another equal Share of the Capital Stock, according to the number of the then surviving *Children*, and so on to the last; and, as soon as the last should attain 25, that he or she should have transferred to him or her, the Residue of the Capital Stock. He then supposes that the last *Child* might not attain the age of 25 years, and he directs that, in that case, the Share of that *Child* shall go to his or her *Children*; and, if that *Child* should have no Issue, then he gives it to the other Legatees, alluding to them as a Class. What the Testator meant was that the Right of each *Child* should depend on there being a Class formed, and that the first Members of that Class who attained 25, should take a Share, the amount of which should be determined by the number of individuals then constituting the Class. The Testator has directed such a distribution to take place, amongst a Class of Persons, as the Law will not allow. If the whole of his intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that intention to allow *Thomas Owen* to take a Third Share of the Fund; for the Testator meant each Person's Share to be determined by the number of the Class, consisting of his Grandchildren and *Thomas Owen*, who should be living when the first attained 25.

[*493] There are several passages in the Judgment in *Leake v. *Robinson*, which exactly apply, in spirit, to this Will.

Declare that the Plaintiff is entitled to the whole Fund.*

 WHITTINGTON v. JENNINGS.

1834: 18th February.—Debtor and Creditor.—Voluntary Deed.

A. made a Voluntary Assignment of a Sum of Money, being, at the time, indebted to B. on Balance of a running Account. A. afterwards made Payments to B., exceeding in Amount the Balance due at the Date of the Assignment; but the Balance continually increased. The Assignment was set aside at the Suit of B.

In 1808 certain Mine-Shares were assigned to Trustees in trust for *Samuel Tice* for life, and, after his decease, for his life, and, after the decease of the Survivor, in trust to raise 760*l.* and pay the same to such Persons as *Samuel Tice* should, by Deed or Will, appoint, and in default of appointment, to his Executors. Mrs. *Tice* died in 1809. In 1811 *Samuel Tice* conveyed his Life Interest in the Mine-Shares and in certain other Property,

* An Appeal from this Decree, on behalf of the Crown, was heard before Lord *Lyndhurst* C.: His Lordship directed a Case to be made for the Opinion of the Court of Common Pleas upon the Will. But, before the Case was argued, the Suit was Compromised.

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to trustees in trust to apply one Moiety in payment of the Sums due from him to the Persons mentioned in the Schedule to the Deed, and to apply the other Moiety for his own maintenance and support.

The Plaintiff was an Innkeeper ; and, in 1812, he entered into an Agreement with *Tice* to provide him with Board and Lodging for 200*l.* a year ; and *Tice* continued to board and lodge in the Plaintiff's house, from *that time until his death. In 1814 *Tice*, being indebted to [*494] the Plaintiff in 68*l.*, executed a Warrant of Attorney for securing that Sum. In 1816 *Tice*, who then owed the Plaintiff 107*l.*, made a voluntary Appointment of the 760*l.* (of which the Plaintiff was wholly ignorant until after *Tice's* death) in favour of the Defendants. From time to time Payments greatly exceeding, in the whole, the Sum due at the date of the Appointment, were made by *Tice* to the Plaintiff, and Settlements of Account took place between them, on every one of which an increased Balance appeared to be due to the Plaintiff, and *Tice* gave him Bonds for those Balances. In 1823, the Plaintiff, at *Tice's* request, paid to the Trustees of the Deed of 1811, the Sum of 150*l.*, being the Balance due to them in respect of their Receipts and Payments under that Deed ; and, thereupon, the Trustees assigned the Trust-property to the Plaintiff in trust for *Tice*. In December 1830 *Tice* died, having, by his Will, appointed the Plaintiff his Executor. At *Tice's* death a balance of 536*l.* was due from him to the Plaintiff.

The Defendants having claimed to have the 760*l.* raised and paid to them, the Bill was filed praying that the Appointment might be declared to be fraudulent and void as against the Plaintiff and *Tice's* other Creditors (if any) ; and that the same might be delivered up to be cancelled, and that the Plaintiff might be declared to be entitled to the 760*l.* as part of *Tice's* Assets.

Sir *E. Sugden* and Mr. *Teed*, for the Plaintiff, said that, at the time when the Appointment was made, *Tice* was in involved circumstances ; that he was then *indebted to the Plaintiff, and that the Debt con- [*495] tinued to exist and increase from that time until his death, and, consequently, the Appointment was void under 13 Eliz. c. 5.

Mr. *Knight* and Mr. *Williams* for the Defendants :

A Creditor who seeks to defeat a Voluntary Deed, must show either that the Grantor was indebted to the extent of Insolvency at the time when he executed the Deed, or that, at that time, he was indebted to the Creditor, and that the Debt remains unpaid. *Lush v. Wilkinson* (a) ; *Kidney v. Coussmaker* (b). In this case there is no proof either of Insolvency or

(a) 5 Ves. 384.

(b) 12 Ves. 126.

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of continuing Debt. It appears, by the Exhibits, that 150*l.* was due from the Testator to the Plaintiff in December 1817, and that, in the course of next Year, he made Payments to the Plaintiff amounting to 220*l.*; therefore the original Debt was destroyed. *Devaynes v. Noble (c)*. On every Settlement of Accounts, the Bond given for the preceding Balance, was delivered up and cancelled.

Sir *E. Sugden* in reply:

The Debt due in 1816 went on continually increasing. Where there is an existing Obligation at the time when the Voluntary Deed is executed, a subsequent Debt on that Obligation will entitle the Creditor to be relieved against the Deed. *Richardson v. Smallwood (d)*. The Deed of 1811 shows that, at that time, the Testator was unable to meet his Engagements, or, in other words, that he was Insolvent. So that, in this case, there was both a continuing Debt and a continuing Insolvency.

[*496] *The VICE-CHANCELLOR:—

In *Devaynes v. Noble* there was, first of all, a Partnership of Five Persons; and then, Mr. *Devaynes* having died, there was a Partnership of Four. A Party who had dealt with the Partnership of Five, continued to have dealing with the Partnership of Four in the course of which they made Payments to him: and the question was whether, as there was a Balance due to him at *Devaynes's* death, he was to be considered as a Creditor of the Five in respect of that Balance, or whether the Payments made to him by the Four, ought to be applied in reduction of that Balance. But that case has no application to this. For, here, the Creditor always dealt with the same Person: and, though some money was, from time to time, paid in respect of the old Debt, that Debt went on continually increasing.

The Testator was Insolvent from 1811; and no Solvency was acquired by the Transaction of 1823, or subsequently. There was only a substitution of a Creditor in lieu of the Trustees; and at the very moment when that substitution was made, the old Debt was increased. It would be an improper application of the principle of *Devaynes v. Noble* to apply it to a case like the present.

Declare that the Plaintiff is entitled to the 760*l.* as part of the Testator's Assets.

WELLESLEY v. WELLESLEY.

1834. 18th February.—*Tenant for Life.—Waste.*

A Mansion-house, Park, and Pleasure Grounds with certain Villas on the Estate, were limited

(c) 1 Mer. 585.

(d) Jacob. 552.

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in strict Settlement; and the Trustees were empowered to grant Building Leases of the Estates, and, at the request of the Tenant for Life, to pull down the Mansion-house, sell the Materials and apply the proceeds in paying off Incumbrances on the Estates. The House was, accordingly, pulled down, but the Tenant for Life unimpeachable of Waste, was afterwards restrained from felling the ornamental Timber in the Park and Grounds.

By the Settlement on the Marriage of Mr. and Mrs. *Long Wellesley*, dated in 1812, the Capital Mansion-house called *Wanstead House*, and the Buildings, Gardens, Orchards and Park thereto belonging were, together with other Hereditaments, conveyed to the use that Lady *C. T. Long* might receive, thereout, a Yearly Rent-charge of 4,500*l.* for her life, with remainder to Trustees for 100 Years, without Impeachment of Waste, upon the Trusts thereafter expressed, and, subject thereto, to the use of Mr. *Long Wellesley* for life, without Impeachment of Waste, with remainder to Trustees to preserve &c. with remainder to Mrs. *Long Wellesley* for life, without Impeachment of Waste, with remainder to Trustees to preserve, &c. with remainder to certain other Trustees, for 1,000 Years, without Impeachment of Waste, in Trust to raise Portions for Younger Children, with remainder to the First and other Sons of the Marriage, successively, in Tail Male: And the Tenants for Life, when in possession of the Estates, and the Trustees, during the minority of any Child entitled to an Estate of Freehold and Inheritance therein, were empowered to grant Leases, for 99 Years, of any parts of the Estates, to any Person who would improve or covenant to improve the same by erecting thereon any House or Houses, Erections or Buildings, or to rebuild or repair any of the Messuages, Tenements, Erections or Buildings which then were, or, at any time thereafter, should be on the Estates, or to expend such Sums in Improvements thereof as should be thought adequate for the interests therein respectively to be parted with. *And the Trustees were also empowered to sell or [*498] exchange any part of the settled Premises, and to apply the Money in payment of the Charges and Incumbrances therein mentioned, and, subject thereto, to invest such Monies in other Lands to be settled to the same uses; and, also, at the request of Mr. and Mrs. *Long Wellesley* or the Survivor of them, to be signified as therein mentioned, to cause *Wanstead House* to be pulled down, or any other of the Mansion-houses, Capital and other Messuages and other Buildings which then were, or should be standing upon any part of the Estates, without rebuilding the same, and to sell the Materials thereof; and it was declared that the Trustees should stand possessed of the Money to arise therefrom, upon the Trusts thereby declared of the Money to arise from the sale of any part of the settled Estates that might be sold under the Power thereinbefore contained.

When the Settlement was executed the Manor of *Wanstead* comprised,

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amongst other things, the Park, Pleasure Grounds and Gardens of *Wanstead*, together with the Mansion-house, and also several ornamental Villas near the Park; and the Park, Pleasure Grounds and Gardens contained a great number of Trees which had been planted or were left standing for the ornament or shelter of the Mansion-house, Park and Pleasure Grounds, in Clumps, Lines, Avenues or Vistas, or in single Trees; and the Lands adjoining to and forming the Approaches to the Mansion-house, Park and Pleasure Grounds also contained a great number of Trees which had been planted or left standing for the ornament or shelter of the Mansion-house, Park and Pleasure Grounds, and also of the Villas contiguous thereto.

[*499] *In pursuance of the Power in the Settlement, the Trustees caused *Wanstead House* to be pulled down, and sold the Materials.

Mrs. *Long Wellesley* died in 1825, leaving the Defendant her Husband, and the Plaintiff, her eldest Son, her surviving.

The Bill, which was filed in 1828, alleged and the Answer admitted that the Defendant had lately caused to be felled a great number of the Trees in the Park, Gardens and Pleasure Grounds of *Wanstead*, which were planted for the ornament thereof, and also divers other Trees planted in Avenues, Vistas and Clumps, and separately or singly, both in the Park and upon the Lands adjoining thereto, for the ornament and shelter of the Park and Pleasure Grounds; and that he had also marked for cutting down nearly 2,000 other Trees which were standing and growing in and about the Park and Pleasure Grounds and the Lands adjoining thereto, the whole of which were either standing in the Park and Pleasure Grounds, and were ornamental thereto, or were planted in Vistas, Avenues and Clumps, or separately and singly upon the Lands and Grounds adjoining the Park and Pleasure Grounds, and were intended for the ornament and shelter thereof. The Bill further alleged that a large proportion of the Trees marked for cutting down, consisted of Limes, Horse Chesnut, Sycamore and other Trees not fit to be felled for Timber, and that, by the felling thereof, the whole of the Demesne of *Wanstead Park* would be laid waste, and become wholly incapable, for a very long period of years, of being applied to the purposes of a residence, either by the Persons who, under the Settlement,

[*500] might thereafter *become entitled in Possession to the Inheritance of the Domain, or by those to whom such Persons might demise the same, and that the Lands and the Messuages erected thereon, would be greatly injured or lessened in value. The Bill prayed that the Defendant might be restrained from cutting down any Timber or other Trees then standing in and upon the Park, Garden and Pleasure Grounds, and which

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were planted or growing there for the protection or shelter of the Park, Garden and Pleasure Grounds, or for the ornament thereof, and from felling or cutting down any Timber or other Trees which were planted and stood or grew in Avenues, Vistas or Clumps, or separately or singly, for the ornament of the Park, Gardens and Pleasure Grounds, or other Grounds and Lands thereto belonging.

The *Vice-Chancellor* granted the Injunction, *ex parte* : and, in 1830, a Motion to dissolve it on the coming in of the Answer, was refused, by Lord *Lyndhurst*. The Cause now came on to be heard.

Sir *E. Sugden*, Mr. *Pepys* and Mr. *Cockerell*, for the Plaintiff :

This Case was argued at great length, on the Motion to dissolve the Injunction. That Motion was refused ; and no alteration has since taken place in the circumstances of the Case. The whole of the Property is of an ornamental nature : and, though the Mansion-house has been pulled down under a power in the Settlement, yet that Settlement did not anticipate that, therefore, the Grounds were to be destroyed. There are several Villas belonging to the Property, which will lose their value if the Timber is cut down. The Plaintiff is within a few months of being of Age ; and, when he comes into *Possession, he may think fit to have the Mansion- [*501] house re-built.

Mr. *Beames* and Mr. *R. Roupell* for the Defendant :

The Settlement, so far from contemplating the continuance and preservation of the Mansion-house, contained a Clause, under which the Trustees, with the sanction of Mr. and Mrs. *Wellesley*, were empowered to pull it down, sell the Materials and apply the Proceeds in paying off the Incumbrances on the Estates. Accordingly, the Mansion-house has been pulled down ; and the Money produced by the sale of the Materials, has been applied in a manner very beneficial to the Persons in Remainder, namely' in paying off the Incumbrances on the settled Estates ; but Mr. *Wellesley*, the Tenant for Life, has been deprived of the benefit he might have derived, either by letting the House or using it as a Residence. It appears, by his Answer, that he was about to exercise, merely, his legal right, by cutting such Timber as was fit to be cut.

Lord *Lyndhurst* gave no Reasons for his Judgment : but, just before his retirement from Office, simply, refused the Motion. It by no means follows that an Injunction ought to be made perpetual, merely because it has been continued until the Hearing.

This Court has never restrained a Tenant for Life unimpeachable of Waste, from exercising his legal right, except where there has been a Mansion-house. *Williams v. Day* (a) ; Lord *Bernard's* Case (b) ;

(a) 2 Ch. Ca. 32.

(b) Prec. Ch. 454.

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[*502] *Abraham v. Bubb* (c); *Packington's Case* (d); **Charlton's Case* (e). There is no Case in which, the Mansion-house having been pulled down under a Provision in the Settlement, this Court has protected the Timber which would have been ornamental to it if it had remained. The Timber is connected with the House, and the House being gone, the Protection of this Court has ceased.

[The *Vice Chancellor* :—The Timber need not, necessarily, be ornamental to the House; for this Court protects Trees even if they are out of sight of the House.]

The Court, certainly, does protect Trees planted at a distance from the House, provided they were planted or left standing with reference to the House. The Marquis of *Downshire v. Sandys* (f); Lord *Tamworth v. Lord Ferrers* (g); *O'Brien v. O'Brien* (h); *Chamberlayne v. Dummer*, (i); *Day v. Merry* (k); *Leighton v. Leighton* (l); *Strathmore v. Bowes* (m).

Lord *Eldon* always lamented the existence of the Jurisdiction of this Court in Cases of equitable Waste, and, uniformly, refused to extend it.

In the Marquis of *Downshire v. Sandys*, His Lordship says: "There is no instance of arguing that the Injunction is to be granted upon that ground, that the Trees are ornamental, not to the Estate upon which they grow, but to the surrounding Country."

[The *Vice-Chancellor* :—Lord *Eldon* there alludes to the Lands of other Persons.]

[*503] *Here the Court is asked to exercise its Jurisdiction with reference to the Villas which are on the outside of the Park.

Burges v. Lamb (n), *Smythe v. Smythe* (o), and *Coffin v. Coffin* (p), also are Cases which show Lord *Eldon's* reluctance to extend the Doctrine of this Court as to Equitable Waste. Here the interference of the Court is sought to protect Timber which was ornamental to a Mansion-house that no longer exists; which is extending the doctrine much further than it has been carried in any Case that has been hitherto decided.

The VICE-CHANCELLOR :

The whole of the Case was before Lord *Lyndhurst*, on the application that was made to him, on the coming in of the Answer, to dissolve the Injunction which I had granted *ex parte*. No Evidence has been gone into; and, therefore, the circumstances of the Case, as they appeared on the Bill

(c) Freem. 53.

(f) 6 Ves. 107.

(i) 1 Bro. C. C. 163.

(m) 2 Bro. C. C. 83.

(p) Jac. 70

(d) 3 Atk. 215.

(g) Ibid. 419.

(k) 16 Ves. 375.

(n) 16 Ves. 171.

(e) 1 Vez. 265, cited.

(h) Amb. 107.

(l) 1 Bro. C. C. 163, note.

(o) 2 Swans. 251.

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and Answer, remain unaltered. The consequence is that I am bound by what Lord *Lyndhurst* has done.

An Account must be taken of the Timber felled and of the Monies received, by Mr. *Wellesley*, from the sale of it. The Amount must be paid into Court, and form part of the Settlement Fund, but he is not to take a Life-interest in it; and the Injunction must be made perpetual.

*GARRETT v. NOBLE.

[*504]

1834 : 19th & 21st February.—*Executors and Trustees.*

Executors who were directed by the Will to call in the Testator's Personal Estate with all convenient speed, continued his Trade for some years after his death, and ultimately a considerable Loss was sustained. But the Court refused to charge them with the Loss, as they had acted *bona fide*, and according to the best of their judgment.

Acquiescence.

If a Person interested under a Will files a Bill for an Account, against the Executors, not seeking to charge them for wilful default, and dies pending the Suit, his Personal Representative cannot charge them by Bill of Revivor and Supplement, if the acts complained of, were known to the deceased Plaintiff.

WILLIAM DEVAYNES, by his Will dated the 15th of June 1808, gave all his Real and Leasehold Estates, and all his Money, Securities for Money, Capital in Trade, Debts, and all other his Personal Estate and Effects, to *William Noble*, *Samuel Pepys Cockerell* and *Frederick Booth*, and their Heirs, Executors, &c. in Trust, with all convenient speed after his decease, to call in and convert into Money all his Personal Estate, and, at such times as they should think proper, absolutely to sell and dispose of his Freehold Estates, either altogether or in Parcels, by Public Auction or private Contract, to such Persons and for such Prices as they should think fit; and to stand possessed of the Proceeds, upon Trust, after payment of his Debts, Legacies and Annuities, for his Son *William Devaynes* and his Children: and he empowered his Trustees to Lease his Real Estates until the Sale thereof, and appointed them his Executors. By a Codicil dated the 17th of June 1808, the Testator revoked the Trusts declared by his Will as to his Real and Personal Estates, and declared that his Real Estates should be held by his Trustees in Trust for his Son *William Devaynes* for life, when he should attain the age of 27 years, and, after his decease, in Trust for his Children as therein mentioned. The Testator then [*505] gave to his Trustees Powers, in the usual form, for Leasing and Selling and Exchanging his Real Estates with the consent of the Person for the time being entitled to the Rents: and, as to his Leasehold and Per-

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sonal Estate, he declared that the same should be converted into Money according to the directions in his Will, and that, out of the Proceeds, his Trustees should pay Debts, and Legacies, &c., and invest the Surplus in the manner directed by his Will, and stand possessed of the Securities upon Trusts corresponding, as nearly as might be, with the Trusts before declared of his Real Estates.

The Testator died in November, 1809. At his death he was a Partner in the Banking-house of *Devaynes, Noble & Co.*: and he also carried on the Business of a Paper-maker at certain Freehold, Leasehold, and Copyhold Mills at Iping in Sussex. The Testator was seised and possessed of Four-Tenths of the Mills and of the Capital, Stock in Trade and Effects belonging thereto, and had agreed, with *T. Harrison* and the Assignees of *Henry Cooke*, his late Partners in the Business, for the purchase of the remaining Shares. The Accounts of this Partnership had not been settled since April 1803, and were in a very confused state. In December 1809, the Executors determined to put an end to the Business of the Mills as soon as practicable, and to sell the Mills and the Stock in Trade and Effects belonging thereto; and, accordingly, they applied to *Harrison* and to *Cooke's* Assignees to concur in the proposed Sale, but the latter refused. In April 1810, at which time there was a considerable Stock in the Mills and several Orders undertaken by the Testator which remained unexecuted, the Executors, by the advice of the Person who had been confidentially employed by [*506] the Testator to manage the Mills *for him, determined, with a view to eventually selling the Mills to the greatest advantage, to continue the working of them, in order that the Trade and Connections and Machinery might be preserved. Accordingly, the Mills were worked, and the Business was carried on in the same manner as in the Testator's lifetime, and the Executors continued their endeavours to sell them and the Stock and Effects belonging thereto, and to prevail on *Harrison* and *Cooke's* Assignees to concur in the Sale. In May 1810 *Harrison* became Bankrupt. In July following, the surviving Partners in the Bank became Bankrupts. In September 1810 *William Devaynes*, the Son, attained 27, and, thereupon, the Trustees and Executors let him into possession of all the Testator's Real Estates except the Mills. In Michaelmas Term 1810 *W. Devaynes* and *Louisa* his Wife filed a Bill against the Executors and Trustees and certain other Persons, stating (amongst other things) that he had been let into possession of *all* the Real Estates, and praying for the usual Accounts, but not complaining of any Breach of Trust or other misconduct on the part of the Trustees and Executors.* On the 12th of March 1811 the Solicitor for *Devaynes* and Wife, by *Devaynes's* desire, wrote a letter to

* See *Devaynes v. Noble*, 1 Mer. 529.

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Booth, inquiring how the *Iping Account* stood, whether the Debts had been collected, and whether there was a probability of the Concern being brought to a close shortly. *Booth* wrote, in answer, that the Executors had been very anxious to put an end to the Concern ever since the death of *Devaynes* the elder, but that disputes about the Title had prevented it. In Easter Term 1811 the Executors were under the necessity of filing a Bill, against the Assignees of *Cooke* and *Harrison*, to compel [*507] a specific performance of the Agreements entered into with the Testator, and to have the Accounts of the Partnership between him and the Bankrupts taken from the 30th of April 1803, and for an Injunction to restrain an Action which *Cook's* Assignees had brought against the Executors, for the recovery of a large Sum of Money. On the 2d of March 1812, the Causes of *Devaynes v. Noble* and *Baring v. Noble* (the latter being a Suit by Creditors of *Devaynes, Noble & Co.*) were heard. *Cooke* having proposed to purchase the Mills and the Stock and Machinery thereon, an Order in the three Causes of *Noble v. Cooke*, *Devaynes v. Noble* and *Baring v. Noble*, was made, in March 1813, on the application of the Executors, with Notice to all Parties and *Devaynes and Wife appearing by their Counsel*, by which, after reciting that the Business of the Mills had been carried on, since the death of the Testator, by his Executors, but the Accounts of the Testator's Estate having been directed, by the Decree in the two last-mentioned Suits, to be taken before the Master, the Executors did not feel themselves warranted in carrying on the Business of the Mills, especially as it had become unproductive, and, if continued, would require a considerable Sum for that purpose; it was referred to the Master to inquire and state whether the Proposal ought to be carried into execution, or whether it was proper that the Mills, Stock in Trade and Effects should be sold in any other manner. On the 5th of July 1814, the Master reported that it would be proper that the Mills, Stock and Effects should be sold to *Cooke* upon the Terms proposed. The Solicitor for *Devaynes* and Wife attended the Proceedings before the Master under the Order, and [*508] took a Copy of the Report. In November 1814, and before the Sale could be completed, *Cooke* again became Bankrupt; and thereupon the Executors discontinued the working of the Mills, except for the purpose of working up the Materials then on the Premises, and discharged the Workmen. In December 1814 a Decree was made, according to the Prayer of the Bill, in *Noble v. Cooke*. In April 1815 the Executors obtained an Order, as before, that the Mills and Utensils should be sold by Auction, and that the Executors should have a reserved Bidding on the Sale. Accordingly the Mills were put up to Sale on the 17th of July 1815, in two Lots; but no Person bid for the first Lot, and there was one Bidding only for the

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second, which was greatly below its value, and, in consequence, the Mills were not sold. On the 7th of November 1815 the Executors obtained an Order, as before, referring it to the *Master* to inquire what it would be proper to do with respect to the Mills. On the 17th of February 1816, the *Master* reported that the Mills ought to be advertised for Sale by Private Contract; and the Solicitor for *Devaynes* and Wife attended before the *Master* as before. The Mills were frequently advertised, but no offer was made for them.

In January 1818, *Devaynes*, the Son, died, leaving his Wife and two Infant Children surviving. In Hilary Term of that year, a Bill of Revivor and Supplement was filed by Mrs. *Devaynes* and her Children, stating (amongst other things) the Will of *Devaynes* the Son, and that his Widow had obtained Letters of Administration with his Will annexed, and praying that the Suits might be revived and prosecuted, and that proper [*509] Directions might be given for Payment, to Mrs. *Devaynes*, of the Jointure appointed to her, under a Power contained in the Will of *Devaynes* the Father, out of his Real and Personal Estate. In November 1818, the Decree was made in the Supplemental Suit, directing the Decree in *Devaynes v. Noble* and *Baring v. Noble*, and the Proceedings therein, and the Accounts and Inquiries thereby directed, to be carried on and prosecuted between the then present Parties in like manner as thereby directed as to the Parties to the said original Causes. On the 17th of June 1820, the Mills were again put up at Auction, under an Order made on Notice to all Parties; but no sufficient Bidding was made for them. Under another Order made, in like manner, in 1821, the Mills were, and had been ever since, let on Lease, with the approval of the *Master*.

Mrs. *Devaynes* afterwards married *Robert Garrett*, and thereupon the Suits were revived. In 1823 *Noble*, who had been the Active Trustee of the Will of *Devaynes* the elder, died: and, in 1824, Mr. and Mrs. *Garrett* and the Infants filed a Bill of Revivor and Supplement against his Executor, praying, amongst other things, for an Account of his Estate possessed by his Executor. In June 1826 the Decree was made in the last-mentioned Suit. In 1827 *Cockerell* died, having appointed his Wife and his two Sons his Executors.

In February 1828 Mr. and Mrs. *Garrett* and the Infants filed a Bill of Revivor and Supplement against the Executors of *Noble* and *Cockerell*, and against *Booth* and other Parties, stating that *Devaynes* the elder had, at his death, a large Capital invested in his Business of a Paper-maker; that, according to the directions in his Will and Codicil, the Implements, [*510] Machinery, *Utensils, Capital and Stock in Trade of the Business ought to have been sold immediately after his death, and the

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Proceeds invested for the benefit of *Devaynes* the younger, his Wife and Children; that the Plaintiffs had, lately and long since the filing of the first Supplemental Bill, discovered that the Executors took upon themselves to carry on the business with the Monies which they received on account of the Capital thereof and the other Personal Estate of their Testator, and thereby his Estate had sustained a loss of 70,000*l.* and upwards. The Bill prayed that the Suits might be revived against *Cockerell's* Executors, and that it might be declared that it was a breach of Trust in the Executors to continue the business of the Mills, and that *Booth*, and the Estates of *Noble* and *Cockerell* might be charged with the loss sustained thereby.

The Defendants, in their Answer, said that the business was carried on *from necessity, and with the knowledge and acquiescence of Mr. and Mrs. Devaynes and their Solicitor*, and that a great Loss would have accrued to the Testator's Estate, if the Business has been stopped upon the Testator's death.

The *Attorney-General*, Mr. *Knight* and Mr. *Spence*, for the Plaintiffs:

The Will and Codicil contain no direction for carrying on the Business; on the contrary, they direct the Personal Estate to be called in, and converted into Money with all convenient speed after the Testator's death. If Trustees continue a Trade when they are not directed so to do—if they carry it on longer than is necessary to wind it up, they do it at their own hazard. *The original Suit was instituted so early as 1810, [*511] and the Decree in that Suit was made in 1812. The Executors might have applied, by Petition in that Suit, for the direction of the Court as to the course which they ought to take. It was not, however, until March 1813 that the question as to the propriety of selling the Mills, was brought under the consideration of the Court. Why was not the plan of Leasing the Mills resorted to before 1821?

Devaynes, the younger, was Tenant for Life only under the Will and Codicil. No conduct of his could affect his Wife or Children; and, consequently, any case of acquiescence that might have been made out against him, is now at an end. Mrs. *Garrett's* Title did not commence till after his death; and the Infants were not brought before the Court until 1818; and, therefore, they cannot be bound by any proceedings in the Suit which took place previously to that time.

[The *Vice-Chancellor*:—If there was acquiescence on the part of *Devaynes* the younger, and the Infants file a Bill in conjunction with his Personal Representative, the Court could not give them any relief. How is the Court to deal with a Suit in which, as to one of the Co-plaintiffs, it ought to dismiss the Bill, and, as to the other Co-plaintiffs, to give relief?]

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The Court is bound to administer relief to Mrs. *Garrett* as Jointress under the Power in the Will of *Devaynes* the elder. She cannot, in that character, be bound by any acquiescence on the part of *Devaynes* the younger.

[*512] **Primâ facie*, the conduct of the Trustees amounts to a Breach of Trust ; but we do not ask the Court now to declare that a Breach of Trust has been committed, but we ask for an Inquiry only.

Sir *E. Sugden*, Mr. *Pepys*, Mr. *Rolfe*, Mr. *Purvis* and Mr. *J. Romilly*, for the Defendants :

The Infants were brought before the Court so early as 1818. In the Bill which was then filed, there is no complaint against the Executors. If a Suit is instituted on behalf of Infants, they are as much bound by it as if they were Adults. If the Mother of the Infants cannot maintain this Suit, the Infants cannot maintain it. The original Bill was filed in 1810, by *Devaynes* the younger, who was deeply interested in his Father's Estate ; and, since his death, the Parties have gone on filing Bills of Revivor and Supplement : ought they then to be allowed to file a new Bill stating facts known to the Person under whom they claim ? If you file a Bill against Executors, and do not charge them for wilful Default, it is too late, after a lapse of 18 years, to file a new Bill against them for that purpose. It appears, from the Evidence, that the Executors were most anxious to do their duty, and that every exertion was made by them to dispose of the Mills. They had great difficulties to encounter, owing to the Bankruptcies of *Cooke & Harrison*, and to *Harrison's* death. If the Executors, when they found that they could not sell the Mills, had stopped the working of them, the Machinery and Trade would have been destroyed. They continued the Trade, as they were justified in doing, merely for the purpose of selling it beneficially ;

[*513] and they employed the same person to manage it, as the *Testator had done, and in whom he had placed entire confidence.

From the letter of March 1811, the Order of March 1813, and the other Orders in the Cause and the Proceedings before the *Master* under them, Mr. *Devaynes*, under whom Mrs. *Garrett* claims, knew that the Trustees were carrying on the Trade and every thing that took place with respect to the Mills, and yet he never made any objection. When Mrs. *Garrett* filed the Bill of Revivor and Supplement in 1818, she did not complain of any misconduct in the Trustees ; but she, thereby, adopted all the prior Proceedings in the Cause, as the Representative of her late Husband.

The *Vice-Chancellor*, after stating the Will and Codicil, proceeded thus :

The Will does not make it imperative on the Trustees to proceed to Sale of all the Personal Property in the Mills, immediately after the death of

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Devaynes the Father; but directs the Trustees, *with all convenient speed after the death of the Testator*, to call in and convert into Money all his Personal Estate. By the Codicil, a Power to sell the Real Estates is given to the Trustees, with the consent of the Person for the time being entitled to the Rents. It is reasonable to suppose that there could not be an advantageous Sale of the Personal Property in the Mills, unaccompanied by a Sale of the Mills themselves. I think, therefore, that the Trustees might, reasonably, pause until a year after the Testator's death, when *Devaynes* the Son attained 27, before they proceeded to sell the Personal Property in the Mills. It appears, from all the Documents that have been read, that the Trustees had no other desire *than to do the best [514] they could in the complicated state of the Testator's affairs.

As *William Devaynes*, on attaining 27, was put in possession of all the Estates except the Mills, it must have occurred to him to inquire why he was not put in possession of the Mills. In the Bill which he filed in 1810, he made no complaint as to the Mills; and yet he must have been aware what was the condition of them and of the Trade connected with them. On the 12th of March 1811, his Solicitor wrote a Letter to Mr. *Booth*, containing inquiries as to the Mills; but no proceeding was taken in consequence of the answer which was sent to those inquiries. In Easter Term 1811, after the Trustees had exerted themselves, but without success, to prevail on the Assignees of *Cooke & Harrison* to concur in a Sale of the Mills, the Bill was filed in *Noble v. Cooke*, to compel a specific performance of the Agreement entered into, by *Harrison & Cooke's* Assignees, with the Testator. In March 1812, a Petition was presented by the Executors in the three Causes of *Noble v. Cooke*, *Devaynes v. Noble*, and *Baring v. Noble*; the institution of which last Suit, it may be observed, must have greatly augmented the embarrassment under which the Executors were labouring. That Petition stated (amongst other things) that the Business of the Mills had been carried on, since the death of the Testator, by his Executors; but that, the Accounts of his Estates being directed, by a Decree in the two last-mentioned Causes, to be taken before the *Master*, the Executors did not feel themselves warranted in carrying on the Concern, especially as it had become unproductive, and, if continued, would *require [515] a considerable Sum of Money for that purpose; and it prayed that it might be referred to the *Master* to inquire and state whether the Proposal, which *Cooke* had made, for the Purchase of the Mills and the Stock and Utensils therein, ought to be carried into execution. On the hearing of this Petition, *William Devaynes* and his Wife appeared by Counsel; and it was then referred to the *Master* to inquire and state whether the Proposal ought to be carried into execution. On the 5th of July 1814 the

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Master made his Report: and it appears on the face of the Report that *William Devayne's* Solicitor attended the *Master* on the reference. In December 1814 the Decree was made in *Noble v. Cooke*. In April 1815, another Order for the Sale of the Mills was obtained in the three Causes, in consequence of *Cooke* having become Bankrupt.

[His Honor then detailed the other Proceedings in the Causes, which took place in the lifetime of *William Devaynes the Son*.] On the making of all these Orders, *Devaynes*, the Son, appeared by Counsel, and his Solicitor attended the Proceedings before the *Master* under them; but no complaint was ever made respecting the Mills. In January 1818 *Devaynes* the Son died; and, in Hilary Term of that year, his Widow, expressly in the character of his Administratrix, together with her Children, filed a Bill of Revivor and Supplement; but, in that Bill, no complaint of any Breach of Trust as to the Mills, was made against the Executors of *Devaynes* the elder. In November 1818, a Decree was made in the Supplemental Suit, which directed the Decree of March 1812 to be carried on and prosecuted;

but no general Report has ever been made in pursuance of that [*516] Decree. In June 1823 *Noble*, who was the acting *Trustee and

Executor under the Will of *Devaynes* the elder, died; and *Cockerell*, another of the Trustees and Executors, has since died. In February 1828 the present Bill was filed by Mrs. *Devaynes*, now Mrs. *Garrett*, and her Husband and Children, which expressly adopts all the Proceedings in the Original Cause, and in the Revived and Supplemental Causes.

The Rule of Law is that, where Trustees *bona fide* exert themselves to discharge their Duty and merely commit an error in judgment, unless there is a plain violation of Trust, they shall not be visited severely. The fair exercise of their judgment is a protection to them, although the consequence may be bad. Here, in the first instance, there was a difficulty, and they set themselves to cope with it as well as they could: and not only was a fair judgment exercised by the Trustees, but their proceedings were watched by *Devaynes* and his Solicitor. If *Devaynes* made no complaint, and his Representative filed a Bill in 1818 and made no complaint, it is monstrous that in 1828, five years after the death of *Noble* who principally acted in the Trusts of the Will, she should file a Bill and say that every thing that has taken place is to go for nothing, and that the matter is to be treated as if it had been only recently discovered that the Trustees had acted wrongly. I think Mr. and Mrs. *Garrett* must be considered, from the very frame of the Bill, to have adopted the representative character and all the prior Proceedings in the Suits.

If this Bill had been filed immediately after the death of *Devaynes* the Son, it ought to have been dismissed, with Costs, so far as it seeks to

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charge the Executors with a Breach of Trust; and, therefore, the proper Decree for me to make, is to direct the Decrees and [*517] Proceedings in the Original and Supplemental Causes to be carried on and prosecuted, and the Accounts and Inquiries thereby directed to be taken and made between the present Parties to these Suits, in like manner as thereby directed as to the then Parties; and to dismiss so much of the Bill as relates to the Breach of Trust charged therein against the Executors, with Costs.

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1834: 16th and 17th April.—*Vendor and Purchaser.—Judgments.*

Testator devised his Estates to Trustees in Trust to sell, and declared their Receipts to be sufficient Discharges: and he directed his Trustees to complete any Contracts for the Sale of his Estates, entered into during his lifetime and remaining incomplete at his death. Held that his Executor was the proper Party to give Receipts for the Purchase-monies of the Estates contracted to be sold by the Testator.

Notice to a Purchaser of Judgments against the Vendor whose Estate is limited to Uses to bar Dower, does not prevent the Purchaser from taking the Estate free from the Judgments, under an exercise of the Power reserved to the Vendor.

THE late Lord *Aylesford*, by his Will dated the 27th of March 1809, devised his Estates in *Suffolk*, *Cambridgeshire* and *Middlesex*, to the Marquis of *Bath* and his Heirs, in Trust to Sell, and directed that the Receipts of the Marquis, his Heirs, Executors or Administrators, for the Monies to arise from the Sale, should be good Discharges to the Purchasers, and that such Monies should be vested in the Marquis of *Bath*, Lord *Dartmouth* and the late Lord *Winchelsea*, upon the Trusts thereby declared; and he appointed his Son, the present Lord *Aylesford*, sole Executor of his Will.

On the 6th of November 1811 the Testator made a Codicil; and thereby, after reciting that he intended, forthwith, to proceed to sell the devised Estates, ratified and confirmed the Devise thereof, in his Will, to the Marquis of *Bath*, Lord *Winchelsea* and Lord *Dartmouth* and their Heirs, upon Trust to sell and dispose of the same or such Parts thereof as should remain unsold at his decease, in the manner directed by his Will, and with the same Powers and Authorities as were thereby for that purpose given and provided: and, also, upon Trust to carry into Execution any Contract or Contracts for the Sale thereof entered into during his lifetime and remaining uncompleted at his death: and he revoked the Trusts declared, by his Will, of the Monies to arise from the Sale of the Estates, and directed that the same should be applied in paying

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off certain Legacies and Incumbrances thereon, and that the Surplus should be laid out in the purchase of other Lands, to be settled to the Uses therein mentioned.

In August 1812, *Matthew Siggs* agreed with the Testator to purchase part of the devised Estates, and paid him a Deposit on the Purchase-money.

The Testator died on the 20th of October 1812. The Trustees accepted the Trusts of the Will and Codicil, and, by Indentures dated the 29th and 30th of September 1814, they, together with the present Lord *Aylesford* conveyed to *Siggs* the Premises which he had agreed to purchase as before-mentioned. Lord *Winchelsea* executed the Deeds by Attorney; but his Co-Trustees and Lord *Aylesford* executed them in Person, and signed the Receipt for the Purchase-money.

On the 11th of October 1814, *Siggs* made a Mortgage of the [519] Premises for a Term of 500 years, which, *by an Indenture of the 21st of August 1821, was transferred to the Plaintiff.

Siggs died in 1826, having devised the Premises to his Son, *Charles Thomas Siggs*, in Fee. In 1827 *C. T. Siggs* sold the Premises, subject to the Mortgage, to the Defendant, *Sanxter*: and the Premises were conveyed to *Sanxter* and his Trustee, to the usual Uses to bar Dower.

By the Decree on the hearing of this Cause, it was referred to the *Master* to take an Account of the Principal and Interest due on the Plaintiff's Mortgage and on the other Incumbrances in the Pleadings mentioned, and to state their Priorities; and, with the consent of all Parties to the Suit, the Premises were ordered to be sold with the approbation of the *Master*.

At the Sale, *Francis Dayrell*, Esq. purchased Lot 1.

The Purchaser took several Objections to the Title, one of which was because the Vendor was unable to produce the Power of Attorney under which the Conveyance to *Matthew Siggs* had been executed on behalf of Lord *Winchelsea*. In order to remove that objection, the Vendor obtained from Lord *Winchelsea's* Devisee, a Conveyance of the legal Fee in One-third of the Premises.

The other Objections not being removed, an Order was obtained referring it to the *Master* to inquire and state whether a good Title could be made to the Lot.

The Purchaser carried in the following Objections before the *Master*:

First: That, by reason of the Indentures of the 29th [*520] and 30th of September 1814 not having been executed by Lord *Winchelsea*, a good Discharge was not given for the Purchase-money by those Deeds. Secondly: That the Estate in contract was subject to numerous unsatisfied Judgments against the Defendant, *Sanxter*.

1834.—Eaton v. Sanxter.

The *Master* held both the Objections valid, and reported against the Title ; whereupon the Vendor excepted to the Report.

Mr. *Knight* and Mr. *Girdlestone*, Junior, for the Vendor :

First: The late Lord *Aylesford*, by entering into the Contract with *Matthew Siggs*, impressed the Property sold with the character or Personality, and thereby relieved the Purchaser from the necessity of seeing to the application of his Purchase-money. Lord *Aylesford's* Executor was the proper Party to give the Receipt for the balance of the Purchase-money, and he, in conjunction with two of the Trustees, did give the Receipt.

Secondly: The Mortgage-term, which is anterior to the Judgments, will be got in; and, the Estate being limited to Uses to bar Dower, the Judgments will be defeated by the exercise of the Power reserved to the Vendor. *Doe v. Jones* (a); *Tunstall v. Trappes* (b).

Sir *E. Sugden* and Mr. *Coote* for the Purchaser :

First: The completion of the Contract with *Siggs*, was, expressly, within the authority of the Trust created by the Codicil. Therefore, it made no difference whether the Testator or his Trustees sold. It was said that the *Testator had converted the Property into Personal- [*521] ty: but it was only a notional conversion in this Court. The three Trustees accepted the Trusts: consequently nothing but the personal Receipt of the Three, could discharge the Purchaser.

[The *Vice-Chancellor*:—If Lord *Aylesford*, when he made the Contract, had received the whole of the Purchase-money and given a Receipt for it, a good Conveyance might then have been made by the Devises in Trust.]

Secondly: The Property purchased was sold under a Decree taken by consent in a Suit to which the Judgment Creditors are not Parties. The object of the Decree, was, simply, to provide for the Payment of those Incumbrancers who are Parties to the Suit. The *Master* has no authority to advertise for Creditors; nor can any Creditors, except those who are Parties to the Suit, be required to come in under or be bound by the Decree.

It was decided, in *Doe v. Jones*, that the execution of a Power defeats Judgments: but it is difficult to come to that conclusion; for it has been decided that, if a Party puts a fetter on his own Estate, he cannot defeat it by a subsequent Execution of his Power. Besides, the decision in *Doe v. Jones*, does not apply to a Case in which Judgments are obtained on Warrants of Attorney executed by the Party after he is in possession of the Estate; for such Judgments are not proceedings *in invitum*.

In this Case too, the Purchaser has Notice of the Judgments, by which his conscience is affected; and *there is a prior Term [*522] of years, which will not be defeated by the Execution of the

(a) 10 Barn. & Cress. 459.

(b) Ante, Vol. 3, p. 300.

1834.—Eaton v. Sanxter.

Power. Any Judgment Creditor may sue out Execution, and make good his Judgment against that Term; or he may redeem the Mortgage, and then tack his Judgment to it.

[The *Vice-Chancellor* :—If the Judgment Creditor's Lien on the Reversion is defeated by the Execution of the Power, he will not be entitled to redeem the Term.]

Mr. *Knight* in reply.

The VICE-CHANCELLOR :

The Provision in the Will as to the Receipts of the Trustees, is not applicable to a Case in which the Testator, in his lifetime, made the Contract for Sale and received part of the Purchase-money.

The Testator, by his Will, devises his Estates to The Marquis of *Bath* in Fee, in Trust to sell; and then he declares that the Receipts of the Marquis for the Monies to arise from the Sale, shall be effectual Discharges to the Purchasers. Then he makes a Codicil, by which he joins Two other Persons as Co-Trustees with the Marquis, and directs them to sell such parts of his Estates as should remain unsold at his decease, in the manner directed by his Will. That applies only to those parts of the Estates which were capable of being sold under the Will. By the Codicil, the Testator has made a Division of the Trust: he has directed his Trustees to sell such parts of his Estates as should remain unsold at his death, and to complete the Contracts for such parts as should have been contracted to be

[*523] sold in his lifetime. Therefore, with respect to the latter, the Sales would be left to be completed so far as the act of the Trustees was necessary. It was not competent to the Testator to impose fetters on the performance of the Contracts which he had entered into. When he had sold any part of his Estates, the Receipt Cause, from the very nature of the Case, became inapplicable. The Executor of the Testator then became the proper Party to give the Receipt for the Purchase money; and, as the Executor joined in the Receipt to Mr. *Sanxter*, he had that Discharge which he ought to have had.

With respect to the Judgments, I think, as the Law now stands, that there is nothing to prevent the Vendor from proceeding, by an exercise of his Power, to vest the Fee-simple in the Purchaser. The Appointment carrying with it the Equity of Redemption of the Term, will enable the Purchaser to take the Estate free from the Judgments.

The consequence is that The *Master* is wrong, and the Exception must be allowed.

1834.—Snowden v. Dales.

SNOWDON v. DALES.

1834: 17th April.—*Deed.—Construction.—Bankrupt.*

A. assigned 800*l.* to Trustees in Trust during the life of *B.* or such part thereof as they should think proper, or at such other Times and in such Portions as they should judge expedient, to pay the Interest to him, or, if they should think fit, to lay it out in procuring for him Diet and other Necessaries, but so that he should not have any right to the Interest other than the Trustees, in their uncontrolled discretion, should think proper, and so as no Creditor of his should have any Claim thereon, nor should the same be subject to his Debts, Disposition or Engagements: and it was declared that, after his death, the 800*l.*, and all Savings and Accumulations of Interest, if any, should be in Trust for his Children, and, if he should have no Child, then in Trust for *C.*

B. became Bankrupt. The Trustees had paid him the Interest down to his Bankruptcy. Held that his Life Interest passed to his Assignees.

By a Deed-poll of the 7th of December 1821, after reciting two Indentures by which *J. Crosby* assigned two Mortgage-sums of 1,000*l.* each, to Trustees upon such Trusts, &c. as he should appoint: It was witnessed, and *Crosby* did thereby appoint that the Trustees should stand possessed of those Sums, in Trust for himself for life, and, after his decease, in Trust to pay thereout 500*l.* and 700*l.* to his Wife's Daughters *Susannah Hepworth* and *Anne Thompson*, respectively; and, as to the remaining 800*l.*, in Trust, during the life of *John Doughty Hepworth*, his Wife's Son, or during such part thereof as the Trustees should think proper, and at their will and pleasure but not otherwise, or at such other Time or Times, and in such Sum or Sums, Portion and Portions as they should judge proper and expedient, to allow and pay the Interest of the 800*l.* into the proper hands of the said *J. Doughty Hepworth*, or otherwise if they should think fit, in procuring for him Diet, Lodging, Wearing Apparel and other Necessaries; but so that he should not have any Right, Title, Claim or Demand in or to such Interest, other than the Trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, *and so as no Creditor of his should or might have any [*525] Lien or Claim thereon in any case, or the same be, in any way, subject or liable to his Debts, Disposition or Engagements; and, in case he should marry and leave a Widow him surviving, then, after his decease, to pay the Interest to his Widow during her life, for her separate use, in such manner as the Trustees should judge proper: and *Crosby* thereby declared and appointed that a proportionate part of the Interest should be paid up to the day of the decease of *J. D. Hepworth* and his Widow; and that, from and after the decease of him or his Widow, the 800*l.* and all Savings or Accumulations of Interest, if any, should be in Trust for his Children in equal Shares, with benefit of Survivorship on any of them dying under 21:

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but, if he should have no Child who should attain 21, then one Moiety of the 800*l.*, and all Savings and Accumulations of interest, if any, should be upon such Trusts, &c. as *Anne Thompson* should appoint, and, in default of appointment, in Trust for her absolutely; and that the other Moiety should be in Trust for *Susannah Hepworth* absolutely: and the Trustees were empowered to apply the Interest and Capital of the Shares of *J. D. Hepworth's* Children for their maintenance and advancement respectively.

Crosby died in October 1822. In April 1832 *J. D. Hepworth* became Bankrupt. The Trustees had paid or applied the Interest of the 800*l.* to him or to his use, down to the time of his Bankruptcy.

The Bill which was filed, by the Assignees, against the Bankrupt and his Infant Children, and against the Trustees and *Anne Thompson* and *Susannah Hepworth*, prayed that the Plaintiffs might be declared to be [*526] entitled "to the Bankrupt's Life-interest in the 800*l.*, for the benefit of his Creditors, and that the Trustees might be decreed to pay, to the Plaintiffs, the Interest of the 800*l.* become due since the Bankruptcy and to accrue during the Bankrupt's life.

The Defendants put in a general Demurrer.

Mr. *O. Anderdon*, in support of the Demurrer, said that, by the Deed, the Trustees had a discretion to determine the payment of the Interest of the 800*l.*, at any time during *J. D. Hepworth's* lifetime, and to accumulate the Interest; and that the words: "all Savings and Accumulations of Interest, if any, shall be in Trust for all and every the Child or Children of the said *J. D. Hepworth*," amounted to a Gift over to the Children.

Mr. *Bethell*, in support of the Bill, said that the Trustees, as the Bill alleged, continued to pay the Interest to *J. D. Hepworth* down to the time of his Bankruptcy, and that then their discretion ceased: *Piercy v. Roberts* (a): that the Deed did not authorize the Trustees to withhold the payment of the Interest during any part of his life, and accumulate it; but directed them either to pay the Interest to him, or to lay it out in procuring Necessaries for him: that the words: "Savings and Accumulations," meant such Savings and Accumulations as might be made after the death of *Hepworth* and his Widow, and until his Children attained 21.

[*527] "The VICE-CHANCELLOR:

It is plain that the Grantor did intend to exclude the Assignees: and that object might have been effected if there had been a clear Gift over.

But the question is whether there is any thing in the Deed that amounts to a direction that the Trustees shall withhold the payment of the Interest and accumulate it, during the lifetime of *J. D. Hepworth*, if they shall think

(a) 1 Myl. and Keen. 4.

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fit. Although the words: "Savings and Accumulations," as they first occur, might bear that construction; yet, taking the whole of the Instrument together, I think that the better construction is that those words do not enable the Trustees to withhold and accumulate any portion of the Interest during the life of *J. D. Hepworth*.

Declare that the Plaintiffs are entitled to the Bankrupt's Life-interest in the 800*l*.

*POWYS v. MANSFIELD.

[*528]

1835:—10th and 21st, 23d and 24th November. 4th December.—1836: 23d February.—*Portions*.—*Satisfaction*.—*Evidence*.

Testator being seized of a Reversion in Fee expectant on the death and failure of Issue Male of himself and his Brother, and being possessed of a Leasehold Estate and of Stock in the Funds, devised the Reversion to Trustees for the term of 1,000 years and gave to them the Leasehold Estate and Stock, in Trust to raise 10,000*l*., which he directed to be held in Trust for his Niece *Julia*, the Daughter of his Brother, for life, and, after her decease, in Trust for any Husband who might survive her, and, after the decease of the Survivor of them, in Trust for all the Children of his Niece who should be then living. The Niece married about three months after the date of the Will: and, by a Settlement made in contemplation of the Marriage, the Testator, in consideration of natural love, &c. for his Niece *Julia*, the Daughter of his Brother, and for her advancement in life and to provide a maintenance for her, charged the Reversion with the payment (after the death of the Survivor of himself and his Brother without leaving Issue Male who should attain 21) of the Interest of 10,000*l*. to his Niece's Husband for life, and after his decease, to his Niece for life, and, after the decease of the Survivor, with the payment of 10,000*l*. to Trustees in Trust for the younger Children of the Marriage. About a year afterwards, the Testator, by a Codicil, disposed of a certain portion of his Property not before mentioned, and, in all other respects, confirmed his Will. The Testator died a Bachelor. His Brother afterwards died leaving Issue *Julia* and five other Daughters. Held that the Provision made by the Settlement was not a satisfaction of the Provision made by the Will.

An Uncle made a Provision for his Niece by his Will, and afterwards by a Settlement on her Marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic Evidence is admissible to show that the Uncle stood in *loco parentis* to his Niece.

No Person can be held to stand in *loco parentis* to a Child whose Father is living and who resides with and is maintained by the Father according to his means.

SIR JOHN BARRINGTON was Tenant for Life, with remainders to his first and other Sons in Tail-male, with remainder to his Brother *Fitzwilliam Barrington*, for life, with remainders to his first and other Sons in Tail-male, with remainder to himself in Fee, of an Estate, in the Isle of Wight, called the Swainston Estate. Sir John was a Bachelor; his Brother, *Fitzwilliam*, was Married, and had Issue Six *Daughters. In [*529] 1813, the eldest Daughter married Sir *Richard Simeon*; and,

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on that occasion, Sir *J. Barrington*, by a Deed to which his Brother was not a Party, charged his Reversion in Fee in the *Swainston* Estate with the Payment of 10,000*l.* to the Trustees of the Settlement, in Trust for Sir *Richard* and Lady *Simeon*, for their lives successively, and, after the death of the Survivor, for their Children: and, on the same occasion, Sir *John* made a Will, by which he gave his Reversion in Fee, to Trustees, for 1,000 Years, in Trust to raise 50,000*l.*, which he gave to the Five younger Daughters of his Brother, equally, on their attaining 21, or marrying; and, subject thereto, he devised the Reversion to Lady *Simeon* and her Sisters for their lives successively, with remainders to their first and other Sons in Tail male.

Sir *John* subsequently obtained a Lease, from Trinity College Cambridge, of the Rectory and Tithes of *Hadfield Broad Oak*, in *Essex*.

In the beginning of the year 1817, the Plaintiff, *Henry Philip Powys*, with the knowledge and sanction of Sir *John* and of *Fitzwilliam Barrington*, paid his Addresses to *Julia*, the third Daughter of *Fitzwilliam Barrington*, and a Marriage was, afterwards, agreed upon between them.

Sir *John*, by his Will dated the 28th of March 1817, gave to his Sister-in-law, *Edith Mary Barrington*, the Wife of his Brother, *Fitzwilliam*, (after the death of the Survivor of himself and Brother) an Annuity of 800*l.*, for life, charged upon his Reversion in Fee in the *Swainston* Estate; and, subject thereto, he devised the Reversion to *William*

[*530] *Browne* and the Rev. *John *Mansfield*, for the term of 1,000

Years, upon the Trusts thereafter mentioned; and, subject thereto, he gave his said Reversion, and also all his other Real Estates, except his Lease of the Rectory and Tithes of *Hadfield Broad Oak*, to his Daughters successively in Tail-male, with remainder to his Niece *Louisa*, wife of Sir *Richard Simeon*, and eldest Daughter of his Brother, *Fitzwilliam Barrington*, for her life, with remainder to her first and other Sons successively in Tail-male, with remainders, in like manner, to his other Nieces, the younger Daughters of his Brother, for their lives, and to their Sons in Tail-male successively.

And he gave the Rectory and Tithes to *Browne* and *Mansfield*, in Trust to accumulate the Rents during the life of his Brother, *Fitzwilliam*; and, after the decease of the Survivor of himself and his Brother, to sell the Rectory and Tithes, and invest the Proceeds in the usual Securities, and to stand possessed thereof, and of the Monies which should arise and be accumulated from the Rents of the Rectory and Tithes during the life of his Brother, upon the Trusts after mentioned.

And he gave all the 5*l.* per Cent. Stock which he might have at his decease, or, in case those Stocks should be paid off during his lifetime, then

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all the New 4l. per Cent. Stock which he might have at his decease, to the same Trustees, upon Trust to accumulate the Dividends during the life of his Brother, and, after the decease of the Survivor of himself and his Brother, to stand possessed of the Stock and Accumulations upon the Trusts thereafter mentioned.

And he declared that the Term of 1,000 Years was limited to *Browne and Mansfield* in Trust, after the *decease of the Surviv- [*531] or of himself and his Brother, in case they should both die without leaving any Issue Male of their respective bodies, or in case either of them should leave any such Issue Male and all such Issue Male should die under the age of 21 Years, then, immediately after the death of such Issue Male under the age of 21 Years, to levy and raise, by Sale or Mortgage of the Hereditaments comprised in the Term, such Sum of Money as would, with the Monies to arise from the Rents of the Rectory and Tithes and from the Accumulations thereof, and from the Sale of the Rectory and Tithes, and with the 5l. per Cent. or 4l. per Cent. Stock and the Accumulations thereof, make up the clear Sum of 50,000l., it being his Will that that Sum should be raised by the means aforesaid, and that the Rents of the Rectory and Tithes and the Accumulations thereof, and the Monies to arise from the Sale thereof, and the 5l. per Cent. or 4l. per Cent. Stock and the Accumulations thereof should be first applied towards the raising of the 50,000l.; and that the Hereditaments comprised in the Term should be liable to raise the deficiency only.

And he directed the Trustees to invest the 50,000l. in the usual Securities and to stand possessed thereof upon the Trusts thereafter mentioned: and, after directing One-fifth part of the 50,000l. to be held upon Trusts, for the benefit of his Niece *Jane Elizabeth Barrington*, the Second Daughter of his Brother *Fitzwilliam*, and her Husband and Issue (if any) and with Limitations over corresponding with the Trusts and Limitations herein-after mentioned with respect to the Share of his Niece *Julia*, he directed the Trustees to pay the further Sum of 10,000l., being one other Fifth part of *the 50,000l., unto his Niece, *Julia Barrington*, [*532] the Third Daughter of his Brother *Fitzwilliam*, for her life, and, after her decease, in case she should leave any Husband her surviving, then to pay the Dividends thereof to such surviving Husband of his Niece *Julia*, for his Life, and, after the decease of such surviving Husband of his Niece *Julia*, or, in case she should leave no Husband, then, after her Decease, to stand possessed of the last-mentioned Sum of 10,000l. in Trust for all and every the Children and Child of his Niece *Julia* who should be then living, and the Issue of any of them who should be then dead leaving Issue, such Issue to take equally amongst them the Shares of their respective Parents,

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equally to be divided between and amongst such Child and Children and their Issue as aforesaid, share and share alike, and to be vested and transmissible Interests in such Child and Children at the usual periods, with benefit of Survivorship amongst such Children and their Issue respectively, in case of the death of any of them before their respective Shares should become vested: And in case no Child of his Niece *Julia*, nor the Issue of any such Child should obtain a vested Interest in the said last-mentioned Sum of 10,000*l.*, then he directed his Trustees to stand possessed of that Sum in Trust for the Person and Persons who, for the time being, should be entitled to his Manors, Messuages, &c. thereinbefore devised, under the Limitations thereinbefore contained, and for such Estate and Interest, Estates or Interests, as the same Person or Persons should be entitled to therein, or as near thereto as the rules of Law and Equity would permit; it being his Will that, in the event of no Child or Children, nor the Issue of any

Child or Children of his Niece *Julia* obtaining a Vested Interest [*533] in the last-mentioned Sum of 10,000*l.*, then that the same should sink into and become incorporated with his said Manors, Messuages, &c., thereinbefore devised, for the benefit of the Person and Persons entitled thereto.

And he directed that the remaining three Fifth parts of the 50,000*l.* should be held upon Trusts for the benefit of his Nieces, *Ann Emma*, *Ellen Flack* and *Mary*, their Husbands and Issue (if any), and with Limitations over corresponding with the Trusts and Limitations of the two other Fifth parts: And he directed that no part of the Hereditaments comprised in the Term of 1,000 Years, should be sold, until some or one of the Sums of 10,000*l.* thereinbefore provided for his said five Nieces and their Children, or some part thereof, should have become vested in and payable to their Children, nor until the other Funds out of which he had directed the 50,000*l.* to be raised, should have been applied in payment of those Sums of 10,000*l.*: And he gave, to *Edith Mary Barrington* and her Daughters, 100*l.* each to buy Mourning, and the residue of his Personal Estate to his Brother *Fitzwilliam*, and appointed him sole Executor of his Will.

On the 20th of April 1817, the Proposals for the Settlement on the Marriage of the Plaintiff with *Julia Barrington*, were forwarded, by Sir John or his Solicitor, to the Plaintiff.

The Terms of the Settlement having been arranged between Sir John *Barrington* and the Plaintiff, without any interference on the part of *Fitzwilliam Barrington*, by an Indenture dated the 2d day of June 1817, and made between the Plaintiff and his Father and Mother, Sir John *Barrington*,

Julia Barrington, who was described as the Niece of Sir [*534] *John Barrington* and one of the Daughters of *Fitzwilliam Bar-*

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rington, (*who was not a party to the Deed,*) and certain other Persons, after reciting, (amongst other things) the intended Marriage, and that, *in consideration of the natural love and affection which Sir John Barrington had and bore to his Niece Julia Barrington, and for her advancement in life, and to provide a maintenance for her,* in addition to the Provision thereafter made for her by the Plaintiff's Father and Mother and by the Plaintiff, and for enabling the said *Julia Barrington* to carry into effect the Contract and Agreement for a Settlement as thereafter expressed, *Sir John Barrington* had agreed to charge his Reversion in Fee in the *Swainston* Estate with the Payment of the annual Sums and Sum in gross thereafter mentioned, in the event, and to be applied to the Uses and upon the Trusts thereafter expressed: And that it had been agreed between the plaintiff's Father and Mother, *Sir John Barrington* the Plaintiff and *Julia Barrington*, that such Provision and Settlement should be made for the Plaintiff and *Julia Barrington*, in the event of her surviving her intended Husband, and also for the Issue of the intended Marriage and other Settlements, Benefits, Powers, Provisoes and Limitations as were thereafter expressed and contained: In was (amongst other things) witnessed that in performance of the recited Agreement on the part of *Sir John Barrington*, and for the considerations therein mentioned, and, *particularly, in consideration of the natural love and affection which Sir J Barrington had and bore to Julia Barrington his Niece, Sir John Barrington* covenanted with the Plaintiff and *Julia Barrington* that his Reversion in Fee in the *Swainston* Estate, and all other Manors, Messuages, &c., whereof *Sir John Barrington* then received the Rents for his life, should after the decease of the Survivor of himself and his Brother *Fitz-*

**William Barrington* without Issue Male, but not before, or, in [*535] case there should be any Issue Male of *Sir John* or of his Brother living at the death of such Survivor, and all such Issue Male should afterwards die under 21, then after the death of such Issue Male, stand charged with the payment, to the Plaintiff for his life, of an annual Sum equal to the Interest of a Sum of 10,000*l.* at the rate of 5*l.* per Cent., and, after his decease, with the payment of the like Sum to *Julia Barrington*, for her life, and, after the decease of the Survivor, in case there should be any Issue of the Marriage, and until some or one Child, being a Son, should attain 21, or, being a Daughter, should attain that age or be married, with the Payment, to the Trustees of the Settlement, of a like annual Sum, to be applied by them for the maintenance, education, and support of all the Children of the Marriage except an eldest or only Son, but in case there should be only one Child, then for the maintenance, &c. of such Child, or otherwise, to suffer the same, or such part or parts thereof as the Trustees should think proper, to accumulate for the benefit of any such Children or

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Child as the case might be ; and, immediately after any such Child, being a Son, should attain 21, or being a daughter should attain that age or be married, or in case any Child or Children, being a Son or Sons, should have attained 21, or, being a Daughter or Daughters, should have attained that age or be or have been married at the decease of the Survivor of the Plaintiff and *Julia Barrington*, then, after the decease of the Survivor of them, with the payment of the gross Sum of 10,000*l.* to the Trustees, to be held by them upon the Trusts thereafter declared : And Sir *John Barrington* further covenanted that the annual Sums should be issuing and payable and raised and paid out of the Rents of [*536] the said Hereditaments, and *that the Plaintiff and *Julia Barrington* and the Trustees should have, and they were thereby invested with a power of Distress, Entry and Sale for the levying thereof on the Premises ; and also that the annual Sums, in case the Rents should, at any time, be insufficient, should be raised by Sale or Mortgage of a competent part of the Premises, and that the 10,000*l.* when the same should become raisable, should be raised by sale or mortgage of a competent part thereof : And Sir *John Barrington* charged all the Hereditaments then vested in or belonging to him, and of which he then received the Rents for his life, and of which the Reversion in Fee was then vested in him, with the payment of the same annual Sums and the said Sum of 10,000*l.* accordingly : And Sir *John Barrington*, for himself and his Heirs, covenanted with the Trustees, to stand seised of the Reversion and Fee-simple of the *Swains-ton* Estate, to the use of the Trustees, their Heirs and Assigns, for enabling them to raise the said Sums in manner aforesaid, and subject thereto, to the use of himself in Fee : And it was thereby agreed between all the Parties thereto, and Sir *John* directed that the Trustees should stand possessed of the 10,000*l.* when raised, upon the following Trusts, that is to say, in case there should be Issue of the Marriage an eldest or only Son and one or more or other Child or Children who, being a Son or Sons, should attain 21, or, being a Daughter or Daughters, should attain that age or be married, then in trust for such Child or Children other than and except an eldest or only Son, and if but one, then for such one Child, his or her Executors, &c., and, if more than one, equally to be divided amongst them, and to be vested and transmissible Interests in them respectively at the ages and times aforesaid, and to be then paid to them if the 10,000*l.* should have become [*537] come *raisable, but if not, then as soon as the same should become raisable. “ And the same Sum, and every part thereof shall be, and the same is hereby made, limited and settled so as to admit of and with benefit of Survivorship between and amongst such Children and their Issue respectively, in case of the death of any one or more of them

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leaving Issue respectively, before he, she or they shall have obtained a vested Interest or vested Interests in the said Sum of 10,000*l.* under the Trusts aforesaid ;” And, in case there should be Issue of the Marriage an eldest or only Son or only Daughter and no other Child or Children, or, being such other Child or Children, in case no such Child or Children, or Issue of such Child or Children should obtain a vested Interest in the 10,000*l.*, then in Trust for such eldest or only Son or only Daughter, as the case should be, and to vest in and be paid to him or her, at the respective times aforesaid ; And, in case of the death of such eldest or only Son or Sons so becoming an only Child, as the case should be, without having obtained a vested Interest in the 10,000*l.* under the Trusts aforesaid, leaving Issue, then in Trust for such Issue, if more than one, share and share alike, and if but one, then for such one absolutely, and to vest in and be paid to such Issue at the like ages and times aforesaid, and in like manner as thereinbefore directed and declared concerning the said Sum of 10,000*l.* in case and in the event of the same becoming vested and payable to any Children or Child of the Marriage* : And the Trustees were directed, after the 10,000*l.* should have become raisable, to invest the Shares thereof which should not be actually payable, in the usual Securities, and to apply a sufficient part of the Interest for the *Maintenance, Education [*538] and Support of the persons presumptively entitled to the Principal, and to accumulate the residue of the Interest for the benefit of the same persons : And the Trustees were empowered to apply one-fourth of the Shares for the advancement of the persons presumptively entitled thereto : provided that in case Sir *John Barrington*, his Heirs, Devisees, or Assigns, or other the person or persons for the time being entitled to the Hereditaments the Reversion whereof was so charged as aforesaid, should, either before or as soon as the 10,000*l.* should become raisable, pay the Sum of 10,000*l.* to the Trustees, then the aforesaid charges of the annual Sums and of the gross Sum of 10,000*l.*, should cease : And if such payment should be made in the lifetime of the Plaintiff and *Julia Barrington*, the Trustees were directed to invest the same Sum in the usual Securities and pay the Interest to the Plaintiff and to *Julia Barrington* for their lives successively, in lieu of the annual Sums made payable to them as aforesaid, and, after the Decease of the survivor of them, the Trustees were to stand possessed of the 10,000*l.*, so to be paid to them, upon the Trusts thereinbefore declared concerning the 10,000*l.* charged on the Reversion of the said Hereditaments, and in exoneration thereof†.

* So in copy Settlement.

† The above statement of the Settlement was correctly taken from a copy of it.

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The Marriage was solemnized shortly after the Execution of the Settlement.

On the 23d of June 1818 Sir *John Barrington* made a Codicil to his Will, which was duly executed and attested, and was as follows :
 [*539] “ Whereas I have lately conveyed, to the Vicar for the time being of the Parish of *Hadfield Broad Oak* in the County of *Essex*, a Messuage in the Town of *Hadfield Broad Oak* called *Chalks*, to be, for ever thereafter, held and enjoyed as a Vicarage House, but have reserved to myself, my Heirs and Assigns, the Pond or Orchard on the east of the same Premises, and which I have since laid to the Premises adjoining now in the occupation of *Thomas Cocks* : Now it is my Will that such Pond and Orchard shall, for ever hereafter, be attached to the same Premises : and I give and devise the same to the Owners and Proprietors of the said Premises, to be held and enjoyed by them in succession, upon the same Trusts and for the same Uses, Estates, &c. as the said Messuage shall be, from time to time, held and enjoyed : also I give and dispose of the Pew in the Parish Church of *Hadfield Broad Oak* aforesaid, which also lately belonged to the said Premises called *Chalks*, and reserved by me as aforesaid, unto and to the use of the Proprietors and Owners for the time being of the *Barrington Estate in Essex*, for ever hereafter : and in all other respects I confirm my said Will.”

On the 7th of July 1818 Sir *John* made another Codicil, which also was duly executed and attested ; but he did not, thereby, alter any of the Devises or Bequests in his Will or former Codicil.

On the 11th of July 1818, Sir *John* wrote a Letter to his Brother, from *Barrington Hall*, his Seat in *Essex*, which was as follows :

My dear Brother :

[*540] I should quit life with the greatest dissatisfaction, if I did not leave, in your hands, a written Testimony of my full conviction of your unceasing affection and attention to me at all times : and, beyond that, I have greatly to admire your never-failing forbearance for so many years past, so as never to have been induced, in any single instance, during that long period, to deviate from it ; I mean with respect to the slightest intimation that an advance of Money might be desirable, if not necessary to you : founding this, and with great truth, on a confidence in me that I was always preparing to supply you with Cash *en masse*, not always readily attainable. Whenever it has chanced to pass over my imagination, at any time for years past, that I might possibly survive you, I have always turned from it as the greatest affliction that could possibly befall me. I thank God it will now happen otherwise in the natural course of Succession. I trust I shall be found, on the whole, to have been more of a just than an unjust

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steward. When *Louisa* married, I was induced to make a disposal of the *Isle of Wight* Property for the benefit of your Family. On the marriage of *Julia*, I found occasion to make another Will, improved upon, I hope, by the destination of my *Tithe Property in Essex*, in Trust to form a Consolidated Fund, eventually to aid the very heavy Demands that will be found to press upon the *Isle of Wight Estate*. This will become a Sum of no inconsiderable amount. In the formation of these Wills I have acted, altogether, free from any personal consideration whatsoever, following the order of priority of Birth as the rule for it. God bless you, my dear Brother, my Sister, and all your six Children. I remain, &c."

The Testator died, on the 5th of August 1818, without Issue, leaving his Brother *Fitzwilliam*, who thereupon became Sir [*541] *Fitzwilliam Barrington*, his only Brother and Heir-at-Law.

Julia, the Plaintiff's Wife, died in September 1821, leaving Issue a Son, her only Child.

Jane Elizabeth Barrington remained unmarried. *Ann Emma Barrington* died unmarried shortly after the Testator. In May 1824 *Ellen Flack Barrington* married *I. G. Campbell*, and died in May 1832, leaving Two Children, *Walter* and *Charlotte*. *I. G. Campbell* died in 1830. In 1827 *Mary Barrington* married *T. Vandeleur*, and died in 1829 without Issue. Lady *Barrington*, Sir *Fitzwilliam's* Wife, died in 1829. Sir *Fitzwilliam* died on the 26th of September 1832, having, by his Will, given one moiety of his Personal Estate to *Jane Elizabeth Barrington*, and the other Moiety, to *Walter* and *Charlotte Campbell*, subject to the payment of a Legacy of 200*l.* to the Plaintiff's Son by his late Wife, and of a Legacy of 100*l.* to each of the Younger Children of his Daughter, Lady *Simeon*, and of a Legacy of 400*l.* to *T. Vandeleur*, the Husband of his late Daughter *Mary*.

On Sir *Fitzwilliam's* death, Lady *Simeon*, *Jane Elizabeth Barrington*, *Philip Lybbe Powys*, the Infant Child of the Plaintiff by *Julia* his late Wife, and *Walter Campbell*, became the Co-heirs of Sir *John Barrington*, and Lady *Simeon* became Tenant for Life in Possession, with remainder to her Eldest Son in Tail-male, of the *Swainston Estate*.

After Sir *Fitzwilliam's* death, a Document in his own handwriting, was found amongst his Papers, containing "an account of [*542] the Sums from time to time advanced to him by his Brother, with the following words written under it. "Fifth August 1818. My most revered, worthy and beloved Brother departed this Life at his Seat *Barrington Hall, Hadfield Broad Oak, Essex*; and, in an interval of 38 Years, as the above Account shows, gave me, out of his Private Purse, 41,380*l.*, besides lots of Money to my family not in this Statement."

The Bill was filed, in May 1833, by *Henry Philip Powys* against the

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Trustees of the Will, Sir *Richard* and Lady *Simeon* and their Eldest Son, the Trustees of the Settlement, *Philip Lybbe Powys*, the Infant Child of the Plaintiff by *Julia* his late Wife, *T. Vandeleur*, *Jane Elizabeth Barrington*, and the Two Infant Children of the late *Ellen Flack Campbell*. It alleged that, on the decease of Sir *Fitzwilliam Barrington*, the Plaintiff became entitled, under the Settlement, to receive the Yearly Sum of 500*l.* out of the *Swainston* Estate, during his Life, and, under the Will of Sir *John Barrington*, to receive the Interest of 10,000*l.*, during his life: that the Provision made by the Settlement, was in addition to, and not in satisfaction of the Provision made, by the Will, for *Julia Barrington*, her Husband and Issue, inasmuch as Sir *John* did not (as Sir *R.* and Lady *Simeon* pretended) stand *in loco parentis* to *Julia Barrington*. The Bill prayed that the Annual Sum of 500*l.* might be paid to the Plaintiff, out of the Rents of the *Swainston* Estate; that Sir *John's* Will might be established, and the Trusts thereof performed; and that the 50,000*l.* might be raised, and the Interest of One-Fifth part thereof be paid to the Plaintiff, during his life.

[*543] *Sir *Richard* and Lady *Simeon*, by their Answer, admitted that Mrs. *Powys*, before her Marriage, lived with her Parents, and was maintained and educated by her Father, partly at his own Expence: that Sir *John Barrington* always entertained the warmest affection for Sir *Fitzwilliam* and his Family, and treated and considered them as the Successors to his Title and Estates, and was anxious that they should maintain themselves in their proper Rank of Life; but that Sir *Fitzwilliam's* Fortune was comparatively small, and insufficient to maintain him and his Family according to Sir *John's* wishes; for which reason Sir *John*, invariably and at all times, took upon himself the relation and duty of a parent towards Sir *Fitzwilliam's* Children, and constantly acted as such, and that he, in a great measure, superintended their Education, was invariably consulted in all matters of importance relative to their welfare, and, particularly, upon the Marriages of such of them as were married; and that he gave, to Sir *Fitzwilliam*, from time to time, Sums amounting to 40,000*l.* and upwards, for the purpose of maintaining himself and family: that Sir *John* expressed, to divers Members of his Family and other persons, his intention to dispose of his *Isle of Wight* Estates, in the event of failure of Issue of himself and of Issue Male of Sir *Fitzwilliam*, for the benefit of all Sir *Fitzwilliam's* Daughters and the Children of such Daughters in Tail, successively, according to priority of Birth, and to provide, for each of the Younger Daughters and their Husbands and Children, a Sum of 10,000*l.* and no more: that Sir *John*, when he made his Will and long before, had taken upon himself the relation and duty of a Parent to Mrs. *Powys* and to all the other Chil-

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dren of Sir *Fitzwilliam*, and that he made the Provision for her *by his Will, in discharge of such duty ; that the Plaintiff, on his [*544] Marriage, treated and negotiated with Sir *John* solely and exclusively ; and that, at the time of making the Settlements and frequently afterwards, Sir *John* declared his intention to be that the Provision made by him, by the Settlement, for the benefit of the Plaintiff and his Wife and their Issue, should be in satisfaction of the Provision made, for Mrs. *Powys*, her Husband and Children, by his Will.

A Music-master and a Drawing-master, who had given Lessons to the young Ladies, and a Dress-maker who had been employed by them, were examined as Witnesses for the Plaintiff. They deposed that their Bills were paid by Sir *Fitzwilliam* and Lady *Barrington*.

Evidence was given, on the part of Sir *Richard* and Lady *Simeon* and their Son, for the purpose of proving, first, that Sir *John Barrington* stood *in loco parentis* to his Nieces ; and, secondly, to prove declarations, made by Sir *John*, that he intended the Settlement to be in lieu of the Provision made by his Will for his Niece *Julia*, her Husband and Issue.

The Witnesses deposed, as to the first point, as follows : That Sir *Fitzwilliam*, in compliance with the wishes of Sir *John*, resided near Sir *John* in the *Isle of Wight*, and maintained a more expensive Establishment than his Income (which did not exceed 400*l.* a year) would allow of : that Sir *John* and his Brother lived on the most affectionate terms with each other : that, for several years, Sir *John* gave Sir *Fitzwilliam* 1,000*l.* a-year : that he took the greatest interest in his Nieces, behaved to them as a Father, and always acted towards them as *the kindest of pa- [*545] rents, not showing more partiality to one than to another : that he frequently gave them Pocket-money and made them other Presents, and, occasionally, advanced Money to defray the expence of their Clothing and Education : that he allowed them to use his Horses and Carriages, and had them frequently to dine with him, and that one or other of them was almost always staying in his House : that he was consulted as to the appointment of their Masters and Governesses, and as to the Marriages of such of them as were married, and that, on the Plaintiff's Marriage, the terms of the Settlement were negotiated between the Plaintiff and Sir *John*, and their respective Solicitors, without any interference on the part of Sir *Fitzwilliam* : that Sir *John*, who gave the instructions for the Settlement on the 20th of April 1817, proposed that the 10,000*l.* should be settled on *all* the Children of the Marriage, but, afterwards, on the suggestion of the Plaintiff, it was agreed that the 10,000*l.* should be settled on the Younger Children only, as the Eldest Son would be entitled to a considerable Estate on his Father's side.

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The Witnesses who were examined as to the Declarations made by Sir John Barrington, were his confidential Solicitors and some of his Relations and intimate Friends. The substance of their Evidence was that they had heard Sir John say that he did not intend to give his younger Nieces more than 10,000*l.* a-piece, and that he meant to limit the *Swainston* Estate to his eldest Niece, Lady *Simeon*, and her Issue Male, so as to place her in the situation of an eldest Son, and that his object in purchasing the Tithes of *Hadfield Broad Oak*, and directing the Rents to be accumulated, was to form a Fund to relieve his *Swainston* Estate from the

[*546] *burthen of providing the 50,000*l.*: that, both before and after the execution of the Settlement, Sir John uniformly spoke of the Fortune of *Julia*, as well as of the other younger Daughters of his Brother, as being 10,000*l.* and no more: and two of the Witnesses said that *they believed and had always understood*, from declarations made by Sir John, that he considered the Provision made, by the Settlement, for his Niece *Julia*, was in lieu and satisfaction of that which he had provided for her by his Will.

Mr. Knight, Mr. Jacob, Mr. Walker, Mr. Chandless and Mr. Pole, for the Plaintiff and the Defendant his infant Son, contended that a person could not stand *in loco parentis* to a Child whose Father and Mother were living and who resided with them; and that the Evidence showed that Sir John stood *in loco parentis* to his Brother, and not to his Brother's Children: that the Provision by the Will was not called a Portion, nor was it in the nature of a Portion, as it was not to be raised until after the death of Mrs. Powys's Father: that the Provision by the Settlement was charged only on the Reversion of the *Swainston* Estate, and was dependent on the contingencies of Sir John and Sir Fitzwilliam Barrington dying without leaving Issue Male who should attain 21; whereas the Provision by the Will was to be raised out of the Rectory and Tithes and the Stock, as well as the Reversion of the *Swainston* Estate, and, consequently, that Provision was certain, so far at least as the Rents and Stock would extend to raise it: that the Provision by the Will extended to every Husband that Mrs. Powys might marry, and to all the Children she might have by them; but the

[*547] Provision by the Settlement was confined to the Husband and younger Children of the then intended Marriage: that *Sir John's letter of July 1818, showed, conclusively, that his Will was made with reference to the intended Marriage between Mr. and Mrs. Powys: that, if the Provision by the Will was satisfied or adeemed by the Settlement, the first Codicil, by confirming the Will, restored or revived it: that Evidence was not admissible to raise the Presumption, especially as Sir John Barrington did not stand *in loco parentis* to Mrs. Powys. *Bellasis v.*

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Uthwatt (a); *Shudal v. Jekyll (b)*; *Roome v. Roome (c)*; *Grave v. Lord Salisbury (d)*; *Powel v. Cleaver (e)*; *Perry v. Whitehead (f)*; *Ex parte Pye (g)*; *Wetherby v. Dixon (h)*; *Brown v. Peck (i)*; *Watson v. Lord Lincoln (k)*; *Rachfield v. Caveless (l)*; *Brown v. Selwin (m)*; *Farnham v. Phillips (n)*; *White v. Evans (o)*; *Druce v. Denison (p)*; *White v. Williams (q)*; *Whitaker v. Tatham (r)*; *Robinson v. Whitley (s)*; *Debeze v. Mann (t)*; *Spinks v. Robins (u)*; *Nicholls v. Judson (x)*; *Barret v. Beckford (y)*; *Mathews v. Mathews (z)*; *Crompton v. Sale (a)*; *Tinney v. Tinney (b)*; *Freemantle v. Bankes (c)*; *Osborne v. The Duke of Leeds (d)*; *Trimmer v. Bayne (e)*; **Langham v. Sanford (f)*; *Hartopp v. Hartopp (g)*; *Gladding ['548] v. Yapp (h)*; *Hurst v. Beach (i)*; *Holmes v. Holmes (k)*; *Mackenzie v. Mackenzie (l)*; *Heather v. Rider (m)*; *Wharton v. Lord Durham (n)*.

Pigott v. Waller (o); *Attorney-general v. Heartwell (p)*; *Jackson v. Hurlock (q)*; *Coppin v. Fernyhough (r)* *Alford v. Earle (s)*; *Rider v. Wager (t)*; *Williams v. Goodtitle (u)*; *Doe v. Kett (x)*; *Smith v. Dearmer (y)*; *Acherley v. Vernon (z)*; *Gordon v. Lord Reay (a)*; *Hinzman v. Poynder (b)*.

Sir C. Wetherell, Mr. Kindersley, Mr. Wray, and Mr. Bethell, for the Defendants, Sir Richard and Lady Simeon and their Infant Son :

The Will and the Recitals in the Settlement, (the Terms of which were proposed by Sir John Barrington and arranged between him and the Plaintiff, without any interference on the part of Sir Fitzwilliam who was not a Party to the Settlement) clearly show that Sir John stood *in loco parentis* to Mrs. Powys. Sir John's bounty to his Brother was intended to benefit not him alone, but the whole of his Family. There is no authori-

(a) 1 Atk. 426, see 427, note.

(d) 1 Bro. C. C. 425.

(g) 18 Ves. 140, see 152, *et seq.*

(k) Amb. 325, see 327.

(n) 2 Atk. 215.

(q) Coop. C. C. 58.

(t) 2 Bro. C. C. 165 & 519.

(y) 1 Vcz. 519.

(b) 3 Atk. 8.

(e) 7 Ves. 508.

(h) 5 Madd. 56.

(l) 2 Russ. 262.

(o) 7 Ves. 98.

(r) 2 Eden, 263, S. C. Amb. 487.

(s) 2 Vern. 209.

(x) 4 T. R. 601.

(a) Ante, vol. 5, 274.

(b) 2 Atk. 516, see 518.

(e) 2 Bro. C. C. 499, see 517.

(h) 19 Ves. 407.

(l) 2 P. W. 158.

(o) 4 Ves. 21.

(r) 7 Bing. 628.

(u) 2 Atk. 491.

(z) 2 Vcz. 635.

(c) 5 Ves. 79.

(f) 2 Mer. 6, see 17 & 23.

(i) Ibid. 351, see 359.

(m) 1 Atk. 425.

(p) 2 Eden, 234, S. C. Amb. 451.

(c) 3 Atk. 181, see 183.

(f) 6 Ves. 544, see 548.

(i) 1 Eden, 140.

(m) Ca. Temp. Talb. 240.

(p) 6 Ves. 385, see 397.

(s) 9 Ves. 577.

(x) Ibid. 300.

(a) 2 P. W. 553.

(d) 5 Ves. 369.

(g) 17 Ves. 184, see 190.

(k) 1 Bro. C. C. 555. §

(n) Ante, vol. 5, 297.

(r) 2 Bro. C. C. 291.

(u) 10 Barn. & Cress. 895.

(z) 3 Bro. P. C. 85.

(t) 2 P. W. 328, see 333.

(y) 3 Young & Jer. 278.

(b) Ibid. 546.

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[*549] ty for saying that the *locus parentis* is *confined to the condition of Orphanage; *Perry v. Whitehead* (c).

In order to raise a Case of Satisfaction, it is not necessary that the Provision by the Will should be called a Portion, but it is sufficient if, as in this Case, it has all the characteristics of a Portion. Sir *John* directed, by his Will, that the 10,000*l.* should sink in case none of *Julia's* Issue should obtain a vested Interest in it, and did not give it over to his other Nieces; therefore, he clearly showed that he did not intend any of them to have double Portions: and the Evidence proves that Sir *John's* main intention was to make the *Swainston* Estate the Family Estate, and that it should go to Lady *Simeon* as little incumbered as possible; and, with that view, he devoted the *Hadfield* Tithes to the raising of the Portions. In deciding on questions of Satisfaction, the Court does not regard slight differences; it only looks to see whether the principal object of both the Provisions is the same Person. Here Mrs. *Powys* was the principal object of both Provisions, and the intention of both of them was the same, namely, to limit the 10,000*l.* in the manner most beneficial to her, under the existing circumstances. The Will and the Settlement are, in many respects, identical: the discrepancies between them are owing to the Marriage being uncertain when the Will was made; and, on that account, Provision was made for every Husband that Mrs. *Powys* might marry, and for the Issue of every Marriage she might contract. Sir *John Barrington* originally proposed that the 10,000*l.* should be settled on all the Children of the Mar-

[*550] riage; but, as his Niece was *going to marry a man of large Landed Property, the eldest Son was, at Mr. *Powys's* suggestion, excluded; he will, however, take the 10,000*l.*, if he is an only Child. Sir *John's* motive in making the Provisions, was affection for his Niece, and not for her Issue: and the discrepancies between the two Provisions, are not sufficient to prevent Ademption: in both instances the Testator had in view the giving of a Portion of 10,000*l.* to his Niece, *Monck v. Monck* (d). The Case of *Shudal v. Jekyll* is no authority for the proposition that the *locus parentis* cannot exist except where the Child is an Orphan. The Case put by the Lord Chancellor, was put by way of illustration merely. In *Grave v. Lord Salisbury*, the thing given was a Lease. In *Powell v. Cleaver*, a gross Sum, not described as a Portion, was given by the Will, and the Parties did not stand in the relative situations of Parent and Child. In *Ex parte Pye*, also, a gross Sum was given, and, in making the Gift, the Testator described the Legatee as the Child of another Man, and, therefore, the presumption was excluded. In *Wetherby v. Dixon* and *Brown v. Peck*, the circumstances were not sufficient to show that the Legacy

(c) See 6 Ves. 546. *et seq.*

(d) 1 Ball. & Beatt. 298.

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was meant to be adeemed. *Debeze v. Mann* merely establishes that, in order to raise a Case of Satisfaction as between Strangers, identity of purpose in making the Gifts, is necessary. In this Case the purposes of the two Provisions are identical; the only difference is in the mode of carrying the purpose into effect. In *Trimmer v. Rayne*, Lord *Eldon* held that the Portion was an Ademption of the Legacy, because the purpose of both Gifts was the same: that Case, therefore, is in our favour.

*Next, with respect to the admissibility of the Evidence to the [*551] Presumption. Most of the Cases in which the Evidence has been rejected, are Cases in which the Settlement was first, and the Will afterwards. There, of course, Evidence is not admissible; for Evidence cannot be given to explain or contradict a written Instrument. Our object is not to show what Sir *John Barrington* meant by his Will, but what was his intention in doing a subsequent, independent act. The Authorities are uniform, that Evidence may be produced to show the Intention with which the Testator made the Advance in his lifetime. *Monck v. Monck*; *Thellusson v. Woodford* (e); *Rosewell v. Bennett* (f); *Biggleston v. Grubb* (g); *Mascal v. Mascal* (h); *Chapman v. Salt* (i); *Weall v. Rice* (k); *Lloyd v. Harvey* (l); *Sheffield v. Lord Coventry* (m).

The Codicil, though it confirmed the Will, could not have the effect of restoring the adeemed Legacy; for the Rule of Law is that an adeemed Legacy forms no part of the Will. *Rider v. Wager*. The confirmation merely amounts to a Declaration that the Will shall remain as it stood at the date of the Codicil, except so far as it was thereby altered. *Crosbie v. MacDoual* (n); *Irod v. Hurst* (o); *Monck v. Monck*; *Drinkwater v. Falconer* (p); *Booker v. Allen* (q). There is no Case that decides that an adeemed Legacy is restored by a *Codicil which [*552] confirms the Will. The Case of *Roome v. Roome* contains merely a *dictum* on the point.

Mr. *Jemmett*, Mr. *Sewell*, and Mr. *Short* appeared for the other Defendants.

The VICE-CHANCELLOR :

The late Sir *John Barrington* was Tenant for life, with remainders to his first and other Sons in Tail-male, with remainder to his Brother *Fitzwilliam Barrington* for life, with remainders to his first and other Sons in Tail-male, with divers remainders over, of an Estate in *Essex*, called the *Barrington* Estate. Sir *John* also was Tenant for Life, with remainders to his first and

(e) 4 Madd. 420.

(h) 1 Vez. 323.

(l) *Ibid.* 310.

(o) 2 Freeman, 221.

(f) 3 Atk. 77.

(i) 2 Vern. 646.

(m) *Ibid.* 317.

(p) 2 Vez. 622.

(g) 2 Atk. 48.

(k) 2 Russ. & Myl. 251.

(n) 4 Ves. 610.

(q) 2 Russ. & Myl. 270.

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other Sons in Tail-male, with remainder to his Brother, *Fitzwilliam*, for Life, with remainders to his first and other Sons in Tail-male, with the Reversion to himself in Fee, of an Estate, in the *Isle of Wight*, called the *Swainston* Estate. Sir *John* was an unmarried man: his Brother was married, and had six Daughters. In 1813 *Louisa*, the eldest Daughter, married a Son of the late Sir *John Simeon*: and, on the occasion of that Marriage, Sir *John Barrington*, by a Deed to which his Brother was not a Party, charged his Reversion in Fee in the *Swainston* Estate with a Sum of 10,000*l.*, to be raised, by Sale or Mortgage, immediately after the decease of the Survivor of himself and his Brother without Issue Male, but not before, or, in case there should be any Issue Male of either of them living at the death of such Survivor, and all such Issue Male should afterwards die under 21, then immediately after the death of such Issue Male: and the Money when raised was to be paid to Trustees upon the Trustees of the Deed.

[*553] *After the Settlement had been made on the Marriage of Miss *Louisa Barrington*, Sir *John Barrington*, as I collect from the Evidence, purchased the Rectory and Tithes of *Hadfield Broad Oak* in Essex.

In the beginning of the year 1817, Mr. *Powys*, the Plaintiff, with the knowledge and approbation of Sir *John Barrington*, paid his addresses to Miss *Julia Barrington*, who was the third Daughter of *Fitzwilliam Barrington*. On the 28th of March 1817, Sir *John Barrington* made his Will: and it distinctly appears, from a Letter which he wrote in the subsequent year, that he made that Will with reference to the intended Marriage of Miss *Julia*. [His honor then stated the substance of his Will, and observed that the Testator, when he mentioned his Brother's Daughters, described them as his Nieces, the Daughters, of his Brother *Fitzwilliam*.] Now with respect to that Clause which directs that, in the event of no child, nor the Issue of a Child, of any of his Nieces, obtaining a vested Interest in the several Sums of 10,000*l.*, the same shall sink into and become incorporated with his Manors, Messuages, &c. thereinbefore devised, for the benefit of the Person or Persons entitled thereto, there certainly might arise a question whether the Testator meant that the whole Fund should sink, or that so much as might have arisen from the *Swainston* Estate, should sink, and that so much as might have arisen from the *Hadfield Broad Oak* Estate and the Stock, should be taken, as a Personal Gift, by the Person or Persons entitled to the *Swainston* Estate.

The next Instrument is the Settlement on the Marriage of Miss *Julia Barrington* with the Plaintiff; to which Sir *John* was a Party, but his Brother

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was not a *Party. It was dated the 2d of June 1818, and the young Lady who was about to be married, was described in [*554] it as *Julia Barrington*, Spinster, Niece of Sir *John Barrington*, and one of the Daughters of *Fitzwilliam Barrington*. [His Honor then stated the Recitals and operative part of the Settlement.]

On the 23d of June 1818, Sir *John Barrington* made a Codicil, which was duly executed and attested ; and, after disposing of a Pond and Orchard, and of a Pew in the Parish Church of *Hadfield Broad Oak*, he, in all other respects, confirmed his Will. On the 7th of July in the same year, Sir *John* made a second Codicil, which also was duly executed and attested, but did not contain the Clause of Confirmation. It would, however, by operation of Law, be a republication of his Will ; and, on the 5th of August 1818, Sir *John* died.

There was Issue of the Marriage between Mr. *Powys* and Miss *Julia Barrington*, one Child only, who is a Defendant in the Suit : and the Bill has been filed, by Mr *Powys*, raising the question whether he is not entitled to receive the Interest, for his Life, of the Sum of 10,000*l.* under Settlement, and of another Sum of 10,000*l.* under the Will.

It was contended that Sir *John Barrington* stood in the situation of a Parent towards the Children of his Brothers. But that question could not have been raised upon the language of the Instruments only ; because, in both of them, from beginning to end, Sir *John* keeps most distinctly in view of the circumstance that he stands in the situation of Uncle to his Brother's Children. Every one of the Children is successively spoken of, in *the Will, as being his Niece ; and, in the Settlement, Miss [*555] *Julia Barrington* is described as being his Niece. But it was said that the Defendants were at liberty to enter into evidence in order to make out that, virtually and in substance, Sir *John* did stand in the situation of Parent towards his Nieces : and my Opinion is that the Parties are at liberty to enter into Evidence for the purpose of proving that circumstance : because, if the Instruments themselves do not state the fact, Parties must, of course, be at liberty to prove what the fact really is : and, accordingly, I thought it right, at the hearing, that the great mass of Evidence that has been given on the part of the Defendants, should be received for the purpose of proving that fact. But the whole of the Evidence amounts only to this, that Sir *John* was most affectionately attached to his Brother *Fitzwilliam*, that he did, in the most liberal manner, supply large Sums of Money for the Maintenance of his Brother ; and that he acted in a very kind manner towards his Brother's Children. They occasionally dined at his house ; they occasionally paid him visits, and had the use of his Horses and Carriages, and he made them Presents from time to time.

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Besides there is a very important Document which is found in this Evidence, namely, a Letter of the 11th of July 1818, written by Sir *John Barrington* to his Brother. The Letter is in these words: "My dear Brother: I should quit life, &c. &c." There is also another Document, in the handwriting of *Fitzwilliam Barrington*, dated on the day on which Sir *John* died, and which is in the following words: "My most revered, worthy and beloved Brother, &c. &c." And Books and [*556] other Documents were produced showing that, upon particular days, large Sums were given by Sir *John* to his Brother. Therefore it is placed beyond all doubt that Sir *John's* great object of affection was his Brother *Fitzwilliam*. In considering the general question whether Sir *John* ought, upon the Evidence that has been given, to be held to have stood in the situation of a Parent to his Nieces, I have put this question to myself: whether any man would think that Sir *John* had departed from any moral obligation whatever, if, instead of making a disposition in favour of his Nieces, he had allowed the Reversion in Fee in the *Swainston* Estate to descend to his Brother, and had included the *Hadfield* Tithes in the Devise of his Personal Estate? It is, I think, plain that if, instead of indulging his own fancy in the disposition of that Property in favor of his Nieces, he had made no disposition of it all, but let the Law take its course, or if he had, in express words, devised it to his Brother, no one could have said that he had violated any moral obligation. My Opinion is that the whole of this Evidence taken together, by no means establishes the fact that Sir *John* ever intended to place himself in the situation of a Parent to his Nieces, in the legal sense of the term; because the legal sense of the term is that the Party has so acted towards the Children as that he has thereby imposed upon himself a moral obligation to provide for them.

I have looked through all the Cases that I can find on the subject; and I cannot find any instance in which a Person has been held to stand in the situation of Parent to a Child, which Child had a Father living, and resided with and was maintained by its Father. I can easily understand [*557] that a Child may have a Father living, but may be as effectually deserted by him as if he had been dead. But there is, I believe, no Case in which it has ever been held that a Person stood in the situation of Parent to a Child, which Child was living with, and was maintained by its Father according to his means. In this Case, so far from any presumption arising on the face of the written Instruments, the presumption is all the other way; because, if there had been any parental feeling on the part of Sir *John* towards his Niece *Julia*, he would, in all probability, have shown it by using some less formal appellation than "Niece." But he has never done so: the objects of his bounty are, uniformly, characterized as what they were

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in their natural state, namely, his Neices. Therefore no presumption what ever arises, either upon the face of the Instruments or from the facts which have been deposed to, that the Settlement was intended to be taken as a satisfaction of what was given by the Will. Besides the Defendants, in the great diffusiveness of their Evidence, have let out certain circumstances which tend to show that, from beginning to end, Sir *John* must have had in his contemplation both the existence of the Will and the existence of the Settlement. It appears, by a Letter which he wrote on the 29th of April 1817, (which was just One Calendar Month and a Day after the execution of his Will) that he was then taking a very active part in the superintendence of the Settlement which Mr. *Powys* was going to make upon his Niece *Julia* : and his Letter of July 1818 is a complete recognition by him of the existence of his Will, and of the heavy Charges that he had thereby made upon the Reversion of the *Swainston* Estate, and of the circumstance that he considered that Will to be a better one than the Will of 1813, because it had called in aid the *Hadfield Broad Oak* ['558] Property, in order to alleviate the Charges on the Reversion of the *Swainston* Estate.

It is observable that one of the witnesses for the Defendants, deposes, in her Answer to the Ninth Interrogatory, that she was staying in the house with Sir *John Barrington* when he made his Will in 1813 and previous to the Marriage of his eldest Niece, *Lady Simeon* ; that he mentioned to the Deponent the circumstance of having made his Will, and said that since he had discovered that he had a Power of disposing of his *Swainston* Estate, he had made his eldest Niece an eldest Son, and had given her younger Sisters 10,000*l.* a piece, payable on the death of their Father, and that, in order to raise those Portions, he had appropriated the Tithes of some of his *Essex* Property. Another Witness, however, represents, distinctly, that it was some time after the making of the Will of 1813, that the Testator purchased the *Hadfield Broad Oak* Property. This shows the danger of admitting that sort of Evidence which has been given to support the Case on the part of the Defendants. For, supposing the Evidence of this latter Witness to be correct, it is impossible that, in a conversation which took place previous to the Marriage of the eldest Miss *Barrington*, the Testator could have said that, in order to raise the Portions, he had appropriated the Tithes of some of his *Essex* Property. Then the former Witness, in a subsequent part of her Answer to the same Interrogatory, says: " After the Marriage of *Julia Barrington* to the Plaintiff, Sir *John Barrington* mentioned to me, the first time of my going to see him after that event, that he had settled 10,000*l.* upon his Niece *Julia*, to be payable after the death of her Father ; and he repeated the Fund out of *which this Portion was to be ['559] paid, namely, out of the Accumulations of the Tithes : and De-

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ponent distinctly understood from him that the 10,000*l.* which he had provided for *Julia* by his Will, and the 10,000*l.* secured by the Settlement made on her Marriage, were one and the same Sum ;” which I take not to be receivable as Evidence, unless, previously, the fact be established that the Party who made the Declaration, had assumed the character of a Parent, which I think is not the case. But then it is very important that this Witness does represent Sir *John* to have said, after *Julia’s* Marriage, that the 10,000*l.* provided for her by the Settlement, was to come out of the *Hadfield Broad Oak* Property, which Property was, *by the Will only*, made liable to Pay the 10,000*l.* The same Witness, in answer to the 20th Interrogatory, says: “I repeatedly before and, occasionally, after the Marriage of *Julia Barrington* to the Plaintiff, heard Sir *John Barrington* speak of his having left his Property at *Swainston* to his eldest Niece, Lady *Simeon*, and of his having made her an eldest Son, and of his having charged the Portions of 10,000*l.* a piece to each of the younger Daughters of his Brother, upon the Fund to be formed by the Accumulations of the Tithes in *Essex*, and the deficiency (in case that Fund should be insufficient at his Brother’s death to pay these Portions) upon the *Swainston* Property :” and that Sir *John* said so is confirmed by the Evidence of Mr. *Cocks*, and by what Miss *Jane Elizabeth Barrington* says in her Answer to the 20th Interrogatory : because she says : “I have heard Sir *John Barrington* declare that he intended to make Lady *Simeon* his Heiress to his *Swainston* Estate, and to give 10,000*l.* to each of her Sisters, and that he intended the Accumulating Rents of the Tithes in *Essex*, to be [*560] *applied to the payment of the Five Sums of 10,000*l.* which he meant to give to his Nieces, in order that the *Swainston* Estate might not be burthened or diminished by providing such Sums ; and that it was his wish that the Accumulations should amount to 50,000*l.* in order that there might be no Charge, in that respect, on the *Swainston* Estate.” So that we find Sir *John* repeatedly acknowledging that the Property subjected, *by his Will*, to the charge of the Portions, did remain liable to pay them.

I cannot but think that, in such a Case as this, where it is not established that the Testator had assumed the Parental Character, it is of great importance to take notice that the Testator did, by a Codicil, when both the Will and the Settlement must have been fresh in his memory (because the Codicil of the 23d of June preceded the Letter of the 11th of July 1818) expressly confirm his Will.

In *Roome v. Roome* The Master of the Rolls held, in a Case where he did not think that the Ademption was clear, and decided against it, that a Codicil, which was a republication of the Will, was a confirmation of the

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Legacy. He says: "It appears too, manifestly, by one circumstance, the Testator did not intend himself there should be any Ademption of the 1,000*l.*, and that is the Codicil made above a year after the 126*l.* had been laid out for Apprenticing the Defendant, which is a confirmation of the Legacy and amounts to a republication of the Will."

The Cases on the subject now before me, are very numerous: it is not however necessary to go through *them all; for the re- [*561] sult of them is stated, by Lord *Eldon*, in the clearest and most comprehensive language, in the Case of *Trimmer v. Bayne*, where the object of the Gift was a natural Child. Lord *Eldon*, in that Case says: "The Rule is settled that, where a Parent or a Person *in loco Parentis*, gives a Legacy as a Portion, and, afterwards, upon Marriage or any other occasion calling for it, advances in the nature of a Portion to that Child, that will amount to an Ademption of the Gift by the Will; and this Court will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a Covenant in this, that the Court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is contended to be given. The Court does not inquire whether the Portion by the Will, is entirely and absolutely to the Child, or what is afterwards advanced in this form, a Settlement upon Marriage, which, not being a performance of a Covenant or satisfaction of a Debt, yet is a presumed satisfaction of the intended Portion."

In *Ex parte Pye*, which came before the same learned Judge subsequently to the Case of *Trimmer v. Bayne*, his Lordship says: "I may state, as the unquestionable Doctrine of the Court, that, where a Parent gives a Legacy to a Child, not stating the purpose with reference to which he gives it, the Court understands him as giving a Portion; and, by a sort of artificial Rule, in the application of which legitimate Children have been very harshly treated, upon the artificial notion that the Father is paying a Debt of Nature, and a sort of feeling upon what is called a leaning against double Portions, if the Father afterwards advances a Portion on the *Marriage of that Child, though of less amount, it is a satisfac- [*562] tion of the whole or in part; and, in some Cases, it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the Portion, though much less than the Legacy, has been held a satisfaction, in some instances, upon this ground, that the Father, owing what is called a Debt of Nature, is the Judge of that Provision by which he means to satisfy it; and though, at the time of making the Will, he thought he could not discharge that Debt with less than 10,000*l.*, yet, by a change of his circumstances and of his sentiments upon that moral Obligation, it may be satisfied by the advance of a Portion of 5,000*l.*"

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And, in a subsequent part of the Judgment, His Lordship says: "It comes to this; that, where a Father gives a Legacy to a Child, the Legacy, coming from a Father to his Child, must be understood as a Portion, though it is not so described in the Will; and afterwards advancing a Portion for that Child, though there may be slight circumstances of difference between that Advance and the Portion and a difference in amount, yet the Father will be intended to have the same purpose in each instance; and the Advance is, therefore, an Ademption of the Legacy; but a Stranger giving a Legacy, is understood as giving a Bounty, not as paying a Debt: he must, therefore, be proved to mean it as a Portion or Provision either upon the face of the Will, or, if it may be, and it seems that it may, by Evidence applying directly to the Gift proposed by that Will." Lord *Eldon* then says: "Upon the authority of *Powel v. Cleaver*, unless you can show that, at the time of making the Will, the Testator meant to give a Portion, as Parent or as standing *in loco Parentis*, and meant to satisfy that, in the [*563] whole or in part, by the subsequent *Advance, the Court is not authorized, by the artificial Rules of Equity, to hold it a satisfaction."

Some of the Cases have decided that, wherever the Party who has made the Provisions, is a Parent or has assumed the parental character, there slight circumstances of difference between the two Provisions, will not prevent the presumption that the second Provision was intended to be an Ademption of the first: but, where the Party who has given both the Provisions, neither is a Parent, nor has assumed the parental character, the Court will look at the Provisions for the purpose of seeing whether any presumption arises from complete identity of purpose. And, if we look at the two Provisions in the present Case for that purpose, we shall find that they differ, materially, from each other. It is true that both the Sums are the same in amount; but the 10,000*l.* given by the Settlement, was charged only on the Reversion of the *Swainston* Estate, and might have been never raisable at all; or it might not have become raisable immediately upon the death of the Survivor of Sir *John* and his Brother, but after a long succession of Minorities, which have endured until so many years had elapsed that the Portion might have been of no use, either to the Parties to the Marriage, or to their Children. And it is also observable that the Provision made by the Settlement, is confined to the Husband who was a Party to the Settlement, and to the younger Children of the then intended Marriage, in case there should be more than one Child: whereas the Provision made by the Will, is extended to any Husband that Miss *Julia* might marry, who might happen to survive her, and to all the Children of every [*564] Marriage that she might contract. And, at all events, *the Pro-

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vision under the Will, must have been satisfied in part; because there must have been some Proceeds to arise from the Stock and the *Hadfield Broad Oak Estate*: so that, if the Reversion had never come into possession, still a Fund was forthcoming which (as the Defendants' Evidence proves) Sir *John Barrington* himself contemplated would be sufficient to satisfy the whole of the 50,000*l.* My Opinion, therefore, is that, in this Case, all presumption of satisfaction arising from identity of purpose, is excluded. And I am confirmed in that Opinion by the Decision in *Brown v. Peck*, which, certainly, was a very strong Case for holding that the Provision by the Will was satisfied. There an *Uncle*, by his Will, had given to his *Niece* Eight Dwelling-houses, with remainders over, and two Legacies of 500*l.* each: and then he made a Settlement on the Marriage of his *Niece*, by which he settled One of those Dwelling-houses, together with Four others and a Sum of 500*l.*, upon the Husband and Wife, successively, and the Issue of the Marriage: and Lord Keeper *Henley* was of opinion that the Settlement made by the Testator on his *Niece*, was not an Ademption or Satisfaction of the Devises and Bequests made to her by the Will.

Great Judges have entertained different notions as to the propriety of the Rule of this Court, that satisfaction may arise on the presumed intention of the Donor. Lord *Hardwicke*, certainly, did not approve of the Rule. Lord *Thurlow*, in *Debeze v. Mann* and *Powel v. Cleaver*, and Lord *Eldon*, in the Cases of *Trimmer v. Bayne* and *Ex parte Pye*, expressed their disapprobation of it. Lord *Kenyon*, however, and Sir *John Leach*, M. R., as appears from the Five Cases in 2 Russ. & Myl., approved of the Rule: and yet one would have thought *that the circumstance of [*565] having Five Cases in succession (a), and of somewhat complicated circumstances, arising all upon the Rule, might have afforded a sort of hint that the Rule tended to raise questions, and, therefore, was not a very convenient one, to say the least of it. My Opinion is, upon the whole view of this Case, that the Defendants have not made out a Case of presumed satisfaction: and the consequence, therefore, is that Mr. *Powys* and his Child are entitled to have both the Portions raised.

Infant.—Evidence.

Evidence cannot be read, even on behalf of an Infant, as to a fact not stated in the Bill, unless it is put in Issue by his Answer.

Evidence tendered on behalf of Sir *Richard* and Lady *Simeon*, was re-

(a) The Cases alluded to, are *Weall v. Rice*, 2 Russ. & Myl. 251; *Brooker v. Allen*, *ibid.* 270; *Carver v. Bowles*, *ibid.* 301; *Lloyd v. Hervey*, *ibid.* 310; *Sheffield v. The Earl of Coventry* *ibid.* 317. All these Cases did not occur, in succession although they are so reported.

1834.—Taylor v. Fisher.

jected by The *Vice-Chancellor* on the ground that it related to a fact which was not put in Issue by their Answer.

Mr. *Bethell*, for the Defendant their Infant Son (who had put in the usual Infant's Answer), contended that the Evidence was admissible on behalf of the *Infant*. But, The *Vice-Chancellor* ruled that Evidence could not be read, even on behalf of an Infant, as to facts not stated in the Bill, unless they were put in Issue by his Answer (b).

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*TAYLOR v. FISHER.

1834 : 10th March.—*Attachment*.—*Practice*.

The Defendant's Time for Answering having expired, the Plaintiff's Clerk in Court gave Notice, on a Saturday, that he must Attach the Defendant at the next Private Seal, which was on Monday following : and, on that day, the Plaintiff sealed an Attachment. On the same day, the Defendant, not knowing that the Attachment had been sealed, applied for an Order for Time, and gave Notice, to the Plaintiff's Clerk in Court, that he had done so. The Attachment was discharged without Costs, as the Defendant had used due diligence in obtaining the Order for Time.

THIS was a Town Cause.

On the 9th of December 1833, the Defendant, who had obtained all the Orders for Time to Answer, filed a Plea to the whole Bill, for want of Parties. On the 11th the Plaintiff submitted to the Plea, and obtained an Order to amend, and amended his Bill accordingly. On the 10th of January 1834, the Defendant obtained an Order for a Month's Time to answer the amended Bill. On Saturday the 8th of February, the Answer not having been filed, the Plaintiff's Clerk in Court gave Notice, in the usual manner, to the Defendant's Clerk in Court, that he must attach the Defendant, for want of Answer, at the first Private Seal, without further Notice. The Plaintiff's Clerk in Court, having received no Notice that the Defendant intended to apply for an Order for Time, sealed an Attachment on Monday the 10th, which was a private Seal-day. On the morning of that day, the Defendant, before he was aware that the Attachment had been sealed, presented a Petition, at the Rolls, for Three Weeks Time, and, at Two o'clock on the same day, gave Notice, to the Plaintiff's Clerk in Court, that he had done so.

The Defendant now moved to set aside the Attachment, for irregularity.

Sir *E. Sugden* and Mr. *Wakefield*, in support of the Motion, said

(b) The Infant came of Age on the 8th of February 1836 ; and afterwards, moved for leave to put in a new Answer, &c. See a Report of the Motion, post.

1834.—Hoy v. Master.

that the Defendant had used due diligence "in obtaining the [*567] Order for Time, and, therefore, the Attachment had been issued against good faith, as the effect of the Notice given on the 8th of February, was that no Attachment would be issued if the Defendant used due diligence in obtaining an Order for Time. *Barritt v. Barritt (a)*.

The *Solicitor-General* and Mr. *Sharpe*, for the Plaintiff, said that the Attachment had not been issued sooner than the Notice intimated; and that the Plaintiff, before he issued the Attachment, had no Notice that the Defendant intended to apply for the Order for Time. *Kirkpatrick v. Meers (b)*.

The VICE-CHANCELLOR :

The effect of the Clerk in Court's Note was that the Plaintiff would not issue an Attachment if the Defendant used due diligence in obtaining an Order for Time. The day after that on which the Note was handed over, was Sunday. The Defendant applied for the Order for Time on the following day. Due diligence, therefore, was used by him in obtaining the Order.

Discharge the Attachment without Costs.

HOY v. MASTER.

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1834 : 14th March.—Will.—Construction.—Trust.

Testator bequeathed the whole of his Property to his Wife, for her life, and directed that, upon her death, One-third should devolve on his Daughter, and that the other Two-thirds should be at the sole and entire disposal of his Wife, trusting that, should she not marry again and have other Children, her affection for their Daughter would induce her to make the Daughter her principal Heir. The Widow died unmarried. Held that she took an absolute Interest in the Two-thirds, under the Will.

SHEARMAN BIRD, by his Will dated the 3d November 1823, devised as follows : " I do hereby will and bequeath the whole of my Property, Landed or Personal, Goods, Chattels, Effects, &c. of all and whatsoever description or sort, to my beloved Wife *Louisa Bird* for the period of her natural life, and then, upon her demise, One-third of the said Property shall devolve on my beloved Daughter *Marian Bird*, and that the other Two-thirds shall be at the sole and entire disposal of my said Wife *Louisa Bird*, trusting that, should she not Marry again and have other Children, her affection for our joint Offspring, the said *Marian Bird*, will induce her to make our said Daughter her principal Heir." On the 11th of November 1823 the Testator made a Codicil in the following words : " I will and bequeath that, in

(a) 3 Swans. 395.

(b) *Ante*, Vol. II. page 16.* *Ex Relatione*.

1834.—*Hoy v. Master.*

the event of my Wife *L. Bird* dying before I do, then the whole of my Property, Goods, Chattels and Effects do and shall devolve to and be at the entire disposal of my Daughter *M. Bird*: and I do hereby further will and bequeath that if my said Daughter *M. Bird* do or should die before I should die, then that my Property, Goods, Chattels and Effects of whatsoever nature, do devolve, and I do hereby bequeath them all to my said Wife *L. Bird*, for her sole and entire disposal, to will or devise or to do with whatever she may desire."

[*569] "The Testator died in 1826, leaving his Widow, and his Daughter his sole Next of Kin him surviving.

The Testator's Estate consisted of Stock in the Funds and other Personal Property.

In 1831, the Daughter married *J. B. Hoy*. In 1832 the Widow died, without having married again, but having made a Will by which, after giving several Legacies, she gave the residue of her Personal Estate to Trustees, upon certain Trusts under which her Daughter took no benefit.

The Bill was filed, by Mr. and Mrs. *Hoy*, against the Executors of the Testator and of his Widow, charging that the Bequest in the Testator's Will in favour of his Widow, did not vest in her an absolute Interest in Two-thirds of the Testator's Property, but gave her a Life Interest therein, with a Power of Appointment after her decease: that the Widow's Will was not an exercise of the Power, and therefore, upon her death, the Two-thirds vested in Mrs. *Hoy* as sole Next of Kin of the Testator: that the Power of Appointment given to the Widow, was intended, merely, to enable her to provide for any Child or Children that she might have in case of her marrying again, and a Trust was reposed in her that, in the event which had happened, the whole of the Property comprised in the Bequest to her, should vest, absolutely, in Mrs. *Hoy*.

The Bill prayed that it might be declared that Mrs. *Hoy*, or her Husband, in her right, became entitled, upon the Widow's death, to the whole of the Testator's Property.

[*570] "Sir *C. Wetherell* and Mr. *Gordon*, for the Plaintiffs, cited *Reith v. Seymour* (a); *Fisher v. Bank of England* (b); *Nannock v. Horton* (c).

Sir *E. Sugden* and Mr. *W. Lowndes* appeared for the Defendants; but,

The Vice-Chancellor, without hearing them, declared that the Two-thirds passed by the Widow's Will.

(a) 4 Russ. 263.

(b) 13 Ves. 111 cited.

(c) 7 Ves. 391.

1834.—Vandiest v. Fynmore.

VANDIEST v. FYNMORE.

1834: 27th March.—*Probate Duty*.

A Testator gave to *A.* a Power to dispose, by her Will, of 5,000*l.*, part of his Estate, on which Probate Duty was paid. *A.* exercised the Power by her Will: Held that Probate Duty was not again payable in respect of the 5,000*l.*

GEORGE VANDIEST, by his Will dated the 12th of February 1811, devised the residue of his Property to Trustees, in Trust, out of the Interest, Dividends or Annual Produce thereof, to pay, to *Ann Hart*, an Annuity of 1,000*l.*, for her separate use for her life; and then proceeded as follows: "I moreover empower the said *Ann Hart* to dispose of and bequeath the 5,000*l.*, or any part thereof, out of my Effects, by her Will duly executed, to any Person or Persons, and in such manner, and under such conditions as she shall, by her said Will, think proper: and my said Executors shall, out of my Effects, pay the said Sum, or any part thereof, accordingly in virtue of such Will."

The Testator died on the 17th of April 1814: and Probate Duty was paid in respect of his Estate.

**Ann Hart* died on the 10th of January 1831, having, by [*571] her Will, disposed of the 5,000*l.* in pursuance of the Power given to her by the Will of the Testator.

In calculating the Probate Duty payable in respect of her Personal Estate, her Executor considered that no Duty was payable in respect of the 5,000*l.*, and, therefore, her Personal Estate and Effects were sworn under 300*l.*, and Probate Duty was paid thereon accordingly. The Commissioners of Stamps having required the Executor to pay a further Duty in respect of the 5,000*l.* on the authority of *Palmer v. Whitmore* (a), and *The Attorney-General v. Staff* (b), the Executor presented a Petition in this Cause (which was instituted for the administration of the Testatrix's Estate) praying either that a sufficient Portion of the Funds in the Cause might be sold for payment of the additional Probate Duty, or that the Petitioner might be at liberty to defend any Suit, Action, or other Proceeding which might be brought against him for Payment thereof.

Mr. *Stuart* for the Petitioner.

Mr. *Stinton* for the Appointees of the 5,000*l.*

The VICE-CHANCELLOR:

The Cases relied on by the Commissioners of Stamps, do not apply; for, in those Cases, the Powers were created by Deed. Here the Power was given by the Will of the original Testator, and the Appointees take as if they had been named in his Will.

(a) *Ante*, Vol. 5. p. 178.

(b) 2 Crompt. & Mees. 124.

1834.—Swale v. Milner.

[*572] *Notwithstanding The Attorney-General does not appear on this Petition, the point is so clear, that I do not think it necessary to send a Case for the Opinion of the Court of Exchequer ; but I shall make an Order according to the second alternative of the Prayer.

SWALE v. MILNER.

1834 : 9th April.—*Creditor's Suit*.—*Costs*.

By the Decree on further Directions, in a Creditor's Suit, the Costs of all Parties were directed to be taxed as between Solicitor and Client, and paid out of a Fund in Court. The Fund proving insufficient to pay the Costs, the Defendants, the Heir and Administrator of the Debtor, petitioned to be paid their Costs, in the first instance. But the Court directed the Fund to be divided amongst all the Parties, in proportion to their Costs.

THIS was a Creditor's Suit against the Heir and Administrator of the Debtor, who had been a Trader.

By the Decree on further Directions, it was ordered that the Costs of all Parties should be taxed, as between Solicitor and Client, and paid out of the Sum of 354*l.* Three per Cents. standing in the name of the Accountant-General in Trust in the Cause. The Costs were taxed accordingly ; the Plaintiffs' at 304*l.*, and the Defendants' at 280*l.* The Stock was sold and produced 315*l.* only.

The Defendants presented a Petition stating that the 315*l.* not being sufficient to pay the whole of the Costs, the Accountant-General was unable to pay such Costs pursuant to the Order, and that he could not pay any part of such Costs without the further Order of the Court : that the

[*573] Petitioners were advised that they were *entitled to have their Costs paid out of the 315*l.*, in the first instance. The Petition prayed that the Costs of the Petitioners might be paid out of the 315*l.*, and that the residue of that Sum might be paid, to the Plaintiffs, on account of their Costs.

Mr. Barber, in support of the Petition, relied on *Young v. Everest* (a).

Sir E. Sugden and Mr. Jacob appeared for the Plaintiffs.

The VICE-CHANCELLOR :

I cannot grant the Prayer of the Petition. The Order on further Directions, directed the Costs of all Parties to be paid : and I cannot vary that Order. All that I can do is to direct a reference to the *Master* to divide the Fund, amongst all the Parties, in proportion to their Costs.

(a) 1 Russ. & Myl. 426.

1834.—Murray v. Lawford and Others.

MURRAY v. LAWFORD, CHITTY AND CUTTUMPAUCUM ARNACHELLA
MOODILIAR.1834: 15th April.—*Practice*.—*Commission to examine Witnesses*.Commission to examine Witnesses at *Madras*, directed to the Judges of the Supreme Court there.

THE Plaintiff had obtained a Commission, in the usual terms, for the Examination of Witnesses in *Scotland* and at *Madras*. He now moved that a Writ in the nature of a Mandamus or Commission to the Chief Justice and Judges of the Supreme Court of Judicature at *Madras*, for the Examination of Witnesses in the Cause, might be issued, and that the same might be executed, and that such Examination might be *returned [*574] pursuant to the Statutes in that behalf made and provided (a).

The Motion was supported by Affidavits made by the Plaintiff and other Persons, stating that the Cause was at issue: that the Plaintiff had then living in *India*, where the subject matter of the Cause arose, several most material Witnesses to examine on his behalf, particularly at *Madras* and within the Presidency of *Madras*, and particularly, as the Plaintiff had been informed and believed, one *Narso Naie*, *William Harris*, &c. &c.: that a very considerable portion of the Evidence necessary to establish his Case, was to be obtained from Witnesses resident in *India*: that, from Advices which he had, within the last few days, received from *India*, he believed that most of his material Witnesses *would refuse to [*575] be examined before the Commissioners already appointed under the Order of the Court for that purpose, unless compelled so to do, in consequence of The *East India Company* being interested, in the event of the Cause, adversely to the Plaintiff: that, as he had been informed and believ-

(a) By 13 Geo. 3, c. 69, s. 44, it is Enacted that when and as often as the *East India Company* or any Person or Persons whatsoever, shall commence and prosecute any Action or Suit in Law or Equity, for which Cause hath arisen or shall hereafter arise in *India*, against any other Person or Persons whatever, in any of His Majesty's Courts at *Westminster*, it shall be lawful for such Courts respectively, upon Motion there to be made, to provide and award such Writ or Writs, in the nature of a Mandamus or Commission, to the Chief Justice and Judges of the Supreme Court of Judicature at *Fortwilliam* or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Bencoolen*, as the Case may require, for the Examination of Witnesses; and that such Examination being duly returned, shall be allowed and read, and shall be deemed good and competent Evidence at any Trial or Hearing between the parties in such Cause or Action, in the same manner, in all respects, as if the several directions thereinbefore prescribed and enacted in that behalf, were again repeated. By 37 Geo. 3, c. 142, s. 11, the powers, &c., of the Mayor's Court at *Madras*, were transferred to the Recorder's Court; and, by 39 & 40 Geo. 3, c. 79, s. 5, to the Supreme Court of Judicature at *Madras*. The above was the first application for a Commission that was made under any of the Acts referred to.

 1831.—Groves v. Perkins.

ed, the Commissioners already appointed would have no power of compelling Witnesses to attend to be examined under the said Commission, or to order the production of any Documents on the execution thereof; and he believed that, unless a Commission were issued to the Chief Justice and Judges of the Supreme Court at *Madras* for the Examination of his Witnesses there, in pursuance of the Act of Parliament in that case made and provided, he should be unable to obtain the Evidence of his Witnesses or the production of Documents in *India* necessary for the establishment of his Case: and that he was advised and believed that he could not safely proceed to a hearing of his Cause, without the Testimony of the Witnesses before named.

Sir *E. Sugden* and Mr. *Williams* for the Plaintiff.

Mr. *Knight* and Mr. *Lloyd* for the Defendants, said the Plaintiff had already obtained an Order for a Commission to examine Witnesses in *India*, and that, if the Motion were granted, the Order, so far as it related to that Commission, must be discharged.

The *Vice Chancellor* discharged so much of the previous Order as directed Commissions to issue for the Examination of Witnesses in *India*, and ordered that a Writ in the nature of a Mandamus or Commission to the Chief Justice and Judges of the Supreme Court of Judicature [*576] at *Madras*, for the Examination of Witnesses in the Cause, should be issued, and that the same should be executed and such Examination be returned according to the Statutes in that behalf made and provided: that Publication should be enlarged until the return of the Commission: and that the Costs of the Application should be Costs in the Cause.

 GROVES v. PERKINS.

GROVES v. CLARKE.

1834: 18th & 19th April.—*Deed.—Fraud.—Inadequacy of Consideration.*

A Wife, who had been deserted by her Husband, became entitled to a Share of an Intestate's Property, amounting to 3,609*l.* The Husband, whilst he was ignorant of the Amount of the Share assigned it in Trust for his Wife and Children, subject to the payment of 10*s.* a week, to himself for his life. Although the Deed recited that the Intestate's Estate was very considerable, yet, as the Administrators, who were the Wife's Brothers and Parties to the Transaction, did not disclose to the Husband the Amount of the Share, the Deed was set aside.

IN 1787 the Plaintiff *William Groves* married *Sarah Perkins*. There was Issue of the Marriage Two Daughters, namely, *Mary*, who afterwards married *Thomas Salter* and *Eliza*, who afterwards married *John Clarke*. In 1792, the Plaintiff deserted his Wife and Children, and cohabited with another Woman; and he had ever since lived separate from them, without contrib-

1834.—Groves v. Perkins.

uting, in any manner, to their support. The Plaintiff was a man of low and irregular habits, and had been, for some years, principally supported by his Brother and his Family, for whom he worked, and who, as one of the Witnesses deposed, treated him more like a Servant than as one of the Family.

In August 1824 *Elizabeth Porteus* a Sister of Mrs. *Groves*, died Intestate leaving *James Perkins*, *Samuel Perkins*, *Margaret Perkins* and Mrs. *Groves*, her Brothers and Sisters, her Next of [*577] Kin. *James* and *Samuel Perkins* took out Administration to the Intestate. Mrs. *Groves's* Share of the Intestate's Property amounted to 3,609*l.* In January 1827, *Samuel Groves*, the Plaintiff's Brother, wrote a Letter to Mrs. *Salter*, which, after stating the Plaintiff to be in very indigent circumstances, concluded as follows: "Your Father has been informed (how correctly I cannot say) that he can claim your Mother's Share of the late Mrs. *Porteus's* Property. His relations, generally, would decline assisting him in such a Claim, conscious that he is not a fit Person to possess a large Sum of Money, and that it would be more reasonable that he should receive a regular and voluntary Allowance from his Children. But, if something should not be contributed voluntarily, he may be driven to some course (supposing the Statement correct) which may be annoying: and I now make the following Suggestion: that you, or some of your Family, shall agree to give your Father a weekly Sum, during his life; and myself, Sons and Relations, by whom he has been, as yet, in some degree assisted, will use whatever influence we possess to cause him to do what may be proper to release your Family from any future Claims on his part." Shortly after the date of this Letter, it was arranged (as the Answers alleged) between *Samuel Groves*, on behalf of the Plaintiff, and *James* and *Samuel Perkins*, on behalf of Mrs. *Groves* that 10*s.* a week should be paid to the Plaintiff, during his life, out of Mrs. *Groves's* Share of Mrs. *Porteus's* Estate, and that the Residue, and all other Property to which Mrs. *Groves* might, at any time, become entitled, should be assigned, for the benefit of herself and her Daughters, in the manner after mentioned; and that *James* and *Samuel Perkins* should procure a proper Deed to be prepared for carrying the arrangement into effect. *James Perkins* [*578] gave instructions for the Deed to his Solicitor; and a Draft was prepared and sent to him for the purpose of being explained to the Parties interested: and, on the 27th of October 1827, the Plaintiff, accompanied by one *Jones*, a Grocer, attended at the Solicitor's Office, and the Deed was then read over and explained to them, and the Plaintiff executed it. The Plaintiff, however, had no professional Adviser, nor was he informed of the Amount of his Wife's Share of the Intestate's Property.

1834.—Groves v. Perkins.

The Deed was dated the 27th of October 1827 ; and, after reciting the Marriage of the Plaintiff and his Wife, and that there was Issue of the Marriage two Daughters ; and that, in October 1792, the Plaintiff left his Family, and had since continued to live separate from them, and that his Wife had, since her separation from her Husband, maintained herself and her Children without receiving any assistance from her Husband ; that Mrs. *Porteus* died in August 1824, Intestate, being, at her death, possessed of very considerable Personal Estate, leaving Mrs. *Groves*, *James Perkins*, *Samuel Perkins* and *Margaret Perkins* her next of Kin, and, as such, entitled to her Personal Estate ; that, on the 25th of October 1824, Letters of Administration to the Intestate were granted to *James* and *Samuel Perkins* by the Prerogative Court of *Canterbury* and the Consistory Court of *Ches-ter* ; that the Plaintiff had proposed, and his Wife had agreed that his Wife's distributive Share of the Intestate's Personal Estate and Effects, and all other the Personal Estate, Monies and Effects of or to which the Plaintiff and his Wife, in her right, were possessed or entitled, should [*579] be assigned to *Price Williams* and *Margaret Perkins*, upon the Trusts after declared, and that all the Personal Estate and Effects which should thereafter belong or come to Mrs. *Groves*, or to the Plaintiff in her Right, should be settled upon the same Trusts : It was witnessed that the Plaintiff and his Wife did Assign, to the Trustees, the before-mentioned Share of the Intestate's Estate, and all other the Personal Estate, Monies and Effects of or to which the Plaintiff and his Wife in her Right, or the Plaintiff in the same Right, were or was possessed or entitled, in Trust to lay out the same upon the Securities therein-mentioned, and, out of the Interest and Dividends, to pay to the Plaintiff, for his life, the weekly Sum of 10s., and, subject thereto, to stand possessed of the Trust Premises in Trust for such persons as Mrs. *Groves* should, by Deed or Will, appoint, and, in default of such Appointment, in Trust for the separate Use of Mrs. *Groves*, for her life, and, after her decease, in Trust for Mrs. *Salter* and Mrs. *Clarke* their Executors, &c., equally, as Tenants in Common.

The Bill was filed in February 1832, against *James* and *Samuel Perkins*, the Trustees of the Deed, and Mrs. *Groves* and her Children, alleging that the Deed had not been perused by any Solicitor on the Plaintiff's behalf, that it had been executed by him for a grossly inadequate Consideration, and when he was in distressed circumstances and ignorant of the amount of his Wife's share of the Intestate's Property, which he had only lately discovered, and that his execution was procured by the fraud and imposition of the Defendants ; and praying a Declaration to that effect and that [*580] the Deed was executed by him whilst he was ignorant of the amount of his Interest in the Intestate's Estate and for an inade-

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quate Consideration ; and that the Deed might be delivered up and cancelled and that his Wife's share might be paid to him, he being willing to settle upon her such Portion of it as to the Court should seem just.

The *Solicitor-General** and Mr. *Spence*, for the Plaintiff :

The Deed was prepared by the Solicitor of *James Perkins*, who was Mrs. *Groves's* Brother ; and he gave the Instructions for it ; therefore, the proposal could not be said to have come from the Plaintiff, as the deed recites. The Plaintiff, when he executed the Deed, was in distressed circumstances and utterly ignorant of his Rights. It appears, by *Jones's* Evidence, that he was asked to accompany the Plaintiff to the Solicitor's Office, for the purpose, merely, of seeing that the 10s. a week were secured to the Plaintiff. Nothing was said as to whether the Arrangement was a provident one or not, on the Plaintiff's part, nor was he then informed of his Rights or of the amount of his Wife's share. In *Gordon v. Gordon* (a) Lord *Eldon* says : " I lay out of the Case the question of Consideration ; and I think myself justified, by the authority of *Cann v. Cann* and other Decisions, in holding that, if a dispute arises relative to the legitimacy of Children ; and the members of the Family, to maintain their character in the world, arrange their rights among themselves, if the matter is *ful- [*581] ly before them, their Agreement will not be disturbed because it is founded on a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate ; but then there must not only be good faith and honest intention, but full disclosure ; and, without full disclosure, honest intention is not sufficient."

Sir *E. Sugden* and Mr. *Sharpe*, for the Defendants :

The Deed recites that the Plaintiff had deserted his Wife and Family ; that Mrs. *Porteus* died possessed of very considerable Personal Estate, and leaving the Plaintiff's Wife and Three other persons her next of Kin ; and that the Plaintiff had proposed and his Wife had agreed that her Share of Mrs. *Porteus's* Estate should be assigned to the Trustees on the Trusts of the Deed. It appears also, by the Letter which *Samuel Groves* wrote to Mrs. *Salter*, that the proposal for the Arrangement came from his own Family. The Evidence shows that the Plaintiff was a person of dissolute habits and not fit to be trusted with Money, and that he was treated, by his Brother and his Family, more as a Servant than as an equal. No Evidence has been given to show that there was any concealment or misrepresentation on the part of the Defendants, or that the Plaintiff was ignorant of his Rights. As the Deed states that Mrs. *Porteus's* Property was very consid-

(a) 3 Swans. 400, see 477. See also *ibid.* 73.

* Sir *C. Pepys*.

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erable, the Plaintiff was bound to inquire what was the amount of it. Lord
Braybroke v. Inskip (b).

[*582] The Rule of this Court is that, if a man abandons his Wife, he is not entitled to any Interest in her Property. *Watkins v. Watkins (c)*; *Wright v. Morley (d)*; *Elliott v. Cordell (e)*; *Aguilar v. Aguilar (f)*. As the Plaintiff owed a high moral obligation to his Wife and Family, whom he had abandoned, there was nothing to prevent his making a Settlement of his own Property, and much less of his Wife's, on her and his Children. If a Woman, on her second Marriage, makes a Settlement on the Children by her first Marriage, it is settled that it is a transaction that cannot be impeached even by a Purchaser for valuable consideration. Although this Court will not enforce an Agreement without Consideration, yet it will enforce an Agreement in favour of a Wife and Children. Here, however, the Contract is not *in fieri*, but has been actually completed; and, if there had not been any pecuniary Consideration whatever for the Settlement, it would have been unimpeachable. The Transaction was never pretended to be a Purchase: the 10s. a week were reserved out of the Fund; and, if the Plaintiff had released every shilling of the Property, it would have been a Transaction which this Court must have upheld.

The VICE CHANCELLOR:

The Plaintiff married the Defendant *Sarah Groves* in 1787. In 1792 he deserted her and her Children, and never afterwards contributed to their support. Mrs. *Groves*, as appears by the Evidence, has lived with and been supported by her Brothers ever since her separation from her

[*583] Husband, and her conduct has been irreproachable. In 1824

Mrs. *Porteus* died Intestate, leaving Mrs. *Groves* and *James, Samuel and Margaret Perkins*, her Brothers and Sisters her Next of Kin; and the two Brothers administered to their deceased Sister. In October 1827 a Deed was executed which the Bill seeks to set aside. That Deed recites &c. [His Honor here stated the Recitals of the Deed, and the Allegations in the Bill.] This is the Case of Fraud made by the Bill; but there is no Evidence whatever in support of it. The Consideration, however, for which the Plaintiff executed the Deed, is very small; and the question is whether, adverting to the nature of the Transaction, there was that disclosure made to the Plaintiff which he was entitled to have. The Administrators do not allege, in their Answer, that they stated to the Plaintiff what was the amount of the Intestate's Property or of his Wife's Share of it; nor is there any Evidence to that effect. The Deed, it is true, recites that Mrs. *Porteus* was, at her death, possessed of very considerable Person-

(b) 8 Ves. 417, see 481.

(c) 5 Madd. 149.

(d) 2 Atk. 96.

(f) *Ibid.* 414, see 1 Roper on Hus. and Wife, 277.

(e) 11 Ves. 12.

 1834.—*Davies v. Goodhew.*

al Estate ; but I do not think that that was a sufficient disclosure. And, though there was not that Fraud in the Transaction which the Plaintiff has charged, yet, as the Administrators withheld from him the knowledge of the amount of his Wife's Share, there was that non-disclosure of a material fact which compels me to say that the Deed cannot stand. As, however, the Plaintiff has charged the Defendants with a Fraud which they never practised, I shall set aside the Deed without Costs. Mrs. *Groves* and her Daughters must have their Costs out of the Fund ; and it must be referred to The *Master* to approve of a proper Settlement.

Decree.—Parent and Child.

In a Suit by a Husband against his Wife and Children, (whom he had deserted), respecting the Wife's Share in an Intestate's Estate, the Decree referred it to The *Master* to approve of a proper Settlement on the *Wife*, with liberty to all Parties to lay Proposals before The *Master*. Before the Report was made, the Wife died. Held that the *Children* were entitled to the benefit of the Decree.

*The Decree, as drawn up, referred it to The *Master* to approve of a proper Settlement on Mrs. *Groves*, (without mentioning her Children), and any of the Parties were to be at liberty to lay proposals before The *Master* for such Settlement. Mrs. *Groves* died before The *Master's* Report was made. The Plaintiff took out Administration to her, and afterwards filed a Supplemental Bill against his Children, claiming the whole of his late Wife's Share of the Intestate's Property. [*584]

The Supplemental Suit was heard before The M. R. on the 18th of April 1836, when His Lordship declared that the Children were entitled to the benefit of the Decree, and referred it to The *Master* to approve of a Settlement,

Mr. *Spence* and Mr. *Dixon* for the Plaintiffs.

Mr. *Pemberton* and Mr. *Sharpe* for the Defendants.

 *DAVIES v. GOODHEW.

[*585]

1834 : 19th and 23d April.—*Conversion.*

By a Marriage Settlement, the Husband covenanted to Pay, to the Trustees, 1,200*l.* in Trust, with the consent of the Husband and Wife and not without, to lay it out in the purchase of Lands in Fee, or for long Terms of Years, or of Copyhold or Customary Tenure, and to settle the same on the Husband for life, without Impeachment of Waste : remainder to the Wife, for life, in bar of Dower, remainder to the use of the Children of the Marriage as the Husband and Wife or the survivor of them should appoint, and, in default of Appointment, to the Use of all the Children of the Marriage in Tail. The 1,200*l.* was invested in the

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Funds, and so remained, with the acquiescence of the Husband and Wife. There was one Child of the Marriage. The Wife survived her Husband and afterwards died. Held that the Fund ought to be considered as Personal Estate.

By the Settlement made on the Marriage of the Rev. *Edward Davies* with *Katherine Farr*, the Grandfather and Grandmother of the Plaintiff, dated the 2d of December 1788, *Edward Davies* covenanted that, immediately on the solemnization of the Marriage, he would pay to Trustees, 1,200*l.* upon Trust, so soon as conveniently might be, *with the joint approbation and consent of himself and Katherine Farr, and not without*, to lay out the same in the purchase of Lands, Tenements or Hereditaments in Fee Simple, or for some long Term or Terms of Years absolute or determinable on lives, or of Copyhold or Customary Lands of Inheritance in possession in Great Britain, and to settle the same in such manner as to enure to the use of or in Trust for himself and his Assigns, during his life, without Impeachment of Waste, and, after his death, to the use of or in Trust for *Katherine Farr* and her Assigns, during her life, for her Jointure and in bar of Dower, and, from and after their several deceases, then to the use of or in Trust for such one or more of the Children or Issue of the Marriage, for such Estate and in such manner as *Edward Davies* and *Katherine Farr*, during their joint lives, and, after the decease of either of [*586] them, as the *survivor should, in manner therein mentioned, appoint, and, in default of such Appointment, to the use of or in Trust for all and every the Child and Children of the said *Edward Davies* and *Katherine Farr* to be begotten, share and share alike, as Tenants in Common, and of the several and respective Heirs of the body and bodies of all and every such Children, and, in default of such Issue, as to one Moiety, to the use of *Edward Davies*, his Heirs, Executors or Administrators, and, as to the other Moiety, to the use of *Katherine Farr*, her Heirs, Executors or Administrators. And it was provided that, until the 1,200*l.* should be laid out in the purchase of such Lands, Tenements and Hereditaments as aforesaid, it should be lawful for the Trustees to lay out the same, or such part thereof as should be undisposed of, in their names, in some one or more of the Public Stocks or Funds, or to lend or place out the same at Interest, on such Security, either Real or Personal, as they, with the consent of *Edward Davies* and *Katherine Farr*, should approve of, with power to vary such Investment: and it was declared that the yearly Dividends, Interest Produce of the Securities should be paid to and received by such Persons as and to whom the Rents and Profits of the Premises so to be purchased as aforesaid, should belong by virtue of the limitations aforesaid.

The 1,200*l.* was paid to the Trustees, and was invested by them in the

1834.—*Davies v. Goodhew.*

purchase of 1,250*l.* Four per Cents. *Edward Davies*, the Plaintiff's Father, was the only Issue of the Marriage. *Edward Davies*, the Grandfather, died in 1812, leaving his Wife *Katherine Davies* and the Plaintiff's Father him surviving, but without having concurred with his Wife in making any appointment of the Trust-Fund.

*One of the Trustees having died, the Fund was transferred [*587] into the names of the surviving Trustee, and of *Katherine Davies* and the Plaintiff's Father. The Plaintiff's Father died, in 1831, Intestate, leaving the Plaintiff and his Sister, both of whom were Infants, his only Next of Kin. *Katherine Davies* died in August 1832, without having any appointment of the Fund. The surviving Trustee having died in the lifetime of *Katherine Davies*, the Fund was, after her death, transferred into the names of her Executors.

The Bill was filed against the Widow and Administratrix of the Plaintiff's Father, the Executors of *Katherine Davies* and the Plaintiff's Sister, submitting that the Fund ought, under the Trusts of the Settlement, to be considered as Real Estate, and that the Plaintiff was entitled thereto as the Heir of the body of his Father; and praying that the Plaintiff might be declared entitled thereto, or to the Lands to be purchased with the Produce thereof, as Tenant in Tail, in case the Court should think proper to direct such Purchase to be made: or, if the Court should be of opinion that the Fund ought not to be considered as Real Estate under the Trusts of the Settlement, then that the Rights of the Parties interested therein might be declared, and that the Executors of *Katherine Davies* might be decreed to transfer the same accordingly, and that the Plaintiff's Share might be secured for his benefit.

The *Solicitor-General* * and Mr. Wood for the Plaintiff, said that it appeared, from the Trusts and Provisions of the Settlement, that the leading object of the *Parties was that the 1,200*l.* should be [*588] laid out in the purchase of Real Estate; and that, as the discretion given by the Settlement had not been exercised by the Parties to whom it was given, the Court ought to exercise it. *Johnson v. Arnold* (a); *Cowley v. Hartstonge* (b).

Sir E. Sugden, Mr. Knight, Mr. Burge and Mr. Heberden for the Defendants:

The Cases cited do not apply. It was quite clear, in those Cases, that the Testator's intention was that the Funds should be laid out in the purchase of Lands of Inheritance. Here the Fund was originally, Money; and there is nothing to be found in the Settlement that stamps it with a

(a) 2 Vez. 169.

* Sir C. Pepys.

(b) 4 Dow. 361.

1834.—*Davies v. Goodhew.*

new character. It was to be laid out with the joint consent and approbation of *Edward Davies* and *Katherine Farr*, and *not otherwise*, in the purchase, not of Lands of Inheritance solely, but for long Terms of Years, or of Copyhold or Customary Tenure; so that the Court cannot say whether it ought to be considered as Freehold, Copyhold or Leasehold Estate. The Fund was and is, and might have never ceased to be Personal Estate. In *Walker v. Denne* (c) the very point was decided; for there The Lord Chancellor says: "But I believe, in every Case of that kind, all of which are very accurately and fully collected in Mr. *Hargrave's* argument in *Pulteney v. Lord Darlington*, it is a necessary circumstance that, where it is by Will, the Will, and, where by Contract, the Deed must decisively and definitely fix upon Money the quality of Land. That is not the present Case; for the Testator has left it perfectly at large, whether, in [*589] the conversion of the Property, it should be *converted into Inheritable Property, or that species of Landed Property that would be distributable as Personal." *Van v. Barnett* (d).

The VICE-CHANCELLOR:

Although this Cause has been heard as a short Cause, I shall not decide it without further consideration.

The *Vice-Chancellor*, after stating the Trusts and Provisions of the Settlement, said: The Husband and Wife never having consented to the Fund being laid out in the purchase of Lands, the question is whether it is to be considered as Personal Estate, or as being impressed with the character of Real Estate.

When the Cause was heard, several Cases were cited, and others exist; but it would be useless to state them at length, as they all admit that whatever a Fund naturally is, it must so remain, unless the Persons who have dominion over it impress upon it a different character. In *Johnson v. Arnold*, Lord *Hardwicke* thought that it was the intention of the Testator that the quality of Real Estate should be impressed on the Money, and therefore, he decided that it must be taken as Real Estate. In *Cowley v. Hartstonge*, The House of Lords decided that the Money was to be considered as Real Estate, because it was evident that the Testator intended that, at some time or other, it should be invested in Land; and that the discretion given to the Trustees to lay it out at Interest, was intended merely to enable them to lay it out, until it could be conveniently *invested in Land. And, in every other Case in which the question has been whether the Property which was the subject of the Suit, ought to be

(c) 2 Ves. jun. 170, *see* 184.

(d) 19 Ves. 102.

1834 —Fazakerley v. Gillibrand.

considered as Real or as Personal Estate, the Court has ascertained the intention of the Parties on that point, and has decided accordingly.

The Case is free from all doubt; because the Parties to the Settlement have declared that the 1,200*l.* should be laid out, *with the joint approbation and consent of the Husband and Wife, and not without*, in the purchase of Lands in Fee Simple, or for some long Term or Terms of Years absolute or determinable on lives, or of Copyhold or Customary Lands of Inheritance. Therefore, if the Fund had ceased to be Money, the Court could not know whether it ought to be taken as Land of Inheritance, as Leasehold, or, if taken as Land of Inheritance whether it ought to go in one mode of descent or another.

I am of opinion that, in this Case, there was no conversion, and therefore the Land remains what it was.

*FAZAKERLEY v. GILLIBRAND.

[*591]

1834: 29th April.—*Double Portions —Satisfaction.*

By a Marriage Settlement, a Term of Years was created for raising Portions for younger Children, which were to vest at the usual periods, but were not to be paid till after the Father's death. And there were the usual Clauses for Survivorship and Maintenance, and also a Proviso that any advance of Money, made by the Father in his lifetime, to the Children, should be a Satisfaction, *pro tanto*, of their Portions, unless the Father should, in writing, direct the contrary. The Father devised all his Real Estates not in Settlement to Trustees in trust to sell and pay his Debts, &c., and to pay the Surplus equally amongst all his Children (except his eldest Son) at the usual times; and, if any of them died under 21 leaving Issue, their Shares were to go to their Issue, but if they left no Issue, then to the Survivors; and the Will contained a Clause for the Advancement of the Children, but was silent with respect to the Provision being a Satisfaction of the Portions. The eldest Son filed a Bill insisting that the Provision by the Will, was intended to be a Satisfaction of the Portions. Some of the younger Children demurred. The Court was of opinion that the Provision by the Will, although it was to arise from the Sale of Lands, and although the Will contained no Declaration on the subject, might be a Satisfaction of the Portions. But the Demurrer was overruled, as it could not appear, until the Hearing, whether there would be any Fund that might be a Satisfaction.

By the Settlement on the Marriage of *Thomas Gillibrand*, Esq. with *Marcella* his Wife, dated in August 1801, the Moiety of the Manor of *Chorley* and of all the other Hereditaments of or to which *Thomas Gillibrand* was seised or entitled for an Estate of Freehold or Inheritance, situate in *Chorley, Adlington, Blackrod*, or elsewhere in the County of *Lancaster*, under the Will of *William Gillibrand* deceased, was limited to the Use of *Thomas Gillibrand* for life, with remainder to Trustees to prererve, &c., with remainder (subject to a Rent-charge of 500*l.*, for the Jointure of *Marcella Gillibrand*) to certain other Trustees, for 500 Years to be com-

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[*592] putted from the decease of *Thomas Gillibrand*, with *remainders to the first and other Sons of the Marriage, successively, in Tail-male.

The Trusts of the Term were for securing the Rent-charge, and, subject thereto, in case there should be one or more Children of the Marriage other than an eldest or only Son, to raise, after the decease of *Thomas Gillibrand*, or in his lifetime if he should so direct, the Sums of 6,000*l.* 8,000*l.*, and 10,000*l.* for the Portions of one, two, three or more such Children respectively, which were to be vested and transmissible Interests in Sons, at 21, and in Daughters, at that age or on their Marriage, and to be then paid to them, if *Thomas Gillibrand* should be then dead, but if not, then immediately after his decease: And, if any of the younger Sons should die or become an eldest Son or only Son under 21, or if any of the Daughters should die under that age and unmarried, then their portions, as well original as accrued, were to go to the Survivors or others of such Children, and to become vested in and be paid to them at the ages and times aforesaid, but no such one, two, three or more Children were to be entitled to more than 6,000*l.*, 8,000*l.*, and 10,000*l.* respectively.

And the Trustees were empowered, after the decease of *Thomas Gillibrand*, or in his lifetime, if he should so direct, to raise and apply a Moiety of the Portions for the advancement of the Children; and also to raise, out of the Rents of the Settled Estates, for the Maintenance and Education of each of the younger Children, such yearly Sum as *Thomas Gillibrand* should, in his lifetime, direct, not exceeding the Interest at Four per Cent. of each Child's Portion, and, in default of such direction, [*593] then such Yearly Sum, not exceeding such Interest, *as the Trustees should think fit; the said Yearly Sums for Maintenance, to be free from all deductions, and to be raised and paid by four equal Quarterly Payments: and the Trustees were not to Mortgage, Sell or Demise any part of the Estates comprised in the Term, until some of the Portions should become payable.

It was then provided that, if *Thomas Gillibrand* should, in his lifetime, give or advance to or with any Child or Children for whom a Portion or Portions was or were intended to be thereby provided, any Sum or Sums of Money, for or towards his or her preferment or advancement in the world, then unless *Thomas Gillibrand* should, by some writing under his hand, direct the contrary, if such advanced Sum or Sums should be equal to the whole of the Portion or Portions of such Child or Children, the same should be accounted to be in full Satisfaction of his, her, or their Portion or Portions; but, if such advanced Sum or Sums should be less than such Portion or Portions, then the same should be considered as part only of his,

1834.—*Fazakerley v. Gillibrand.*

her or their Portion or Portions, and so much Money only should be raised, under the Trusts of the Term, for the Portion or Portions of the Child or Children so advanced, as, with the Sum or Sums so to be advanced, would complete the Sum intended to be thereby provided for such Child or Children: and the Term was to cease when the Trusts were satisfied.

There was Issue of the Marriage, *William Gillibrand*, and the Plaintiff, who afterwards took the name of *Fazakerley*, and seven other Children, five of whom had attained 21. *William Gillibrand* died in his Father's lifetime, and thereupon the Plaintiff became the eldest Son of the Marriage.

**Thomas Gillibrand*, who was seised of other Estates besides ['594] those comprised in the Settlement, made his Will dated the 17th of December 1825, and thereby, after directing all his just Debts and Funeral and Testamentary Expenses to be paid out of his Personal Estate except such parts thereof as he might thereafter bequeath as Heir-looms, and charging his Real Estates with the payment of the deficiency, directed his Executors to allow his Wife, *Marcella*, the Use of all his Plate, and of his Library or Bookcase, and also all his Books, for her life, and, after her decease, he directed the same, as also all Family Pictures to be considered and to pass, *as in the nature of Heir-looms*, to the eldest Son of his Family, and so to pass on, from time to time, to the Head of his Family being Owners of his Mansion-house called *Gillibrand Hall*; and he bequeathed all his Household Goods and Furniture, Monies, Securities for Money, Goods, Chattels, Carriages, Horses and Personal Estate and Effects, of whatsoever nature or kind the same might be, and of which he should die possessed or entitled unto (except such part thereof as might be considered Heir-looms) unto his Wife, her Executors, &c. And he gave all and every his Mesuages, Tenements, Lands, Hereditaments, Ground-rents, and all and every his real Estate, were the same Freehold, Copyhold, Leasehold or Customary, or of whatever tenure the same might be, and wherever the same might be situate, and all his Estate and Interest therein, *and which might not be subject to Settlement*, or of which he had the power of disposing, unto certain Trustees, their Heirs, Executors, Administrators and Assigns, upon Trust, *after the expiration of six calendar Months next after his decease*, to sell the *same. And he directed the Trustees to [*595] stand possessed of the Monies to arise from such Sale, in Trust to discharge, in the first place, the remainder of such of his Debts, Funeral and Testamentary Expenses as his Personal Estate (except as aforesaid) should not be sufficient to pay, and then to pay the Trust Monies equally amongst all his Children then born or which might thereafter be born (except his eldest Son, or such of his Son or Sons as might be the Owner or

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Owners either of the *Gillibrand* or *Fazakerley* Estates) equally amongst them, such of them as might be Sons to be entitled to their respective Shares at their ages of 21, and such of them as might be Daughters, at their ages of 21 years, or on their Marriage; and, in case of the death of any of his Children before attaining 21 leaving lawful Issue, he directed his Trustees to pay the Shares of such Children equally amongst their Issue; and, in case of the death of any of his Children under 21 and without leaving any lawful Issue, then he directed his Trustees to pay their Shares equally amongst his surviving Children (except as aforesaid) and the Issue of such of them as then might be dead leaving Issue to take as aforesaid. And he authorized his Trustees (if they should think fit) to advance the whole, or any part of the expectant or presumptive Shares of his said Children, to them, or to any other Person or Persons, for their Advancement, in such manner as his Trustees should deem advisable, although the Portions of such Children should not then have become payable or vested: and he appointed the Trustees Executors of his Will.

The Testator made a Codicil, duly executed and attested, bearing date the 22d of November 1827; and, thereby, after reciting that [*596] he was Lord of the Manor of **Chorley* and was Owner of certain Coal Mines and other Mines and Minerals in *Chorley* aforesaid, and supposing that the general devise in his Will of all his Messuages, Lands, &c. might not be sufficient to pass the said Manor, Coal Mines, and other Property which he might die possessed of and entitled unto, and to remove any doubts that might arise in respect thereof, he, gave and devised his said Manor of *Chorley* and Moiety or Moieties and Parts and Shares of the said Manor, and also all Coal Mines, and other Mines and Minerals of every description, which he was possessed of or entitled unto, and wherever the same might be situate, and which were not in Settlement, and of which he had the power of disposing, to the Trustees named in his Will, their Heirs, Executors, &c., upon and for the same Trusts intents and purposes, and for the benefit of the same Persons, and in the same manner as he had, by his Will, given all his Messuages, Lands, &c., and subject to the same several Clauses, Provisoos and Agreements as were mentioned in his Will: which he thereby confirmed in every respect.

The Testator died in December 1828, leaving *Marcella Gillibrand*, his Widow, and the Plaintiff, his eldest Son, and seven other Children him surviving. The Trustees and Executors having disclaimed and renounced, the Widow and the Rev. *Richard Thompson* were appointed Trustees in their place, and the Widow took out Letters of Administration to the Testator with his Will, and Codicil annexed.

The Bill which was filed in March 1834, against the Trustees of

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the Will, Sir *George Goold* the surviving Trustee of the Term of 500 Years, and the younger *Children of the Marriage, alleged [*597] that the younger Children claimed to be entitled to the Proceeds of the Real Estates devised by the Will, and also to their Portions under the Settlement; but the Plaintiff charged that the former were intended to be in Satisfaction or Substitution, or, at least, in part Satisfaction or Substitution for the latter, and that the younger Children were bound to elect to take, either under the Settlement or under the Will: that, in February 1832, the younger Children filed their Bill* against Sir *George Goold* and the Plaintiff in this Suit, stating the Settlement, but taking no notice of the Will and Codicil, and praying that the Trusts of the Settlement relative to the Portions, might be carried into execution: that the Plaintiff was advised that the only question in that Suit, was whether he should be justified in paying the Portions of such of the younger Children as were then Infants, to Sir *George Goold*, but the Plaintiff was not apprized of any Question as to the Satisfaction of the Portions provided by the Settlement by the Portions given by the Will and Codicil, and, therefore, no such Question was raised by his Answer.

The Bill then set forth the Decree in *Gillibrand v. Goold*, and charged that the younger Children, or, at least, such of them as were adult, had, by filing the Bill and taking the Decree in that Cause, elected to take under the Settlement and to give up, for the Plaintiff's benefit, the Portions provided for them by the Will and Codicil, or, if the Court should be of opinion that they or any of them were not bound by such election, that they ought to make their election then, or, at least, *after [*598] the clear amount of the Portions given to them by the Will and Codicil, should have been ascertained, and that they ought to be declared to be entitled to one Portion only; and that they ought not to be permitted to enforce the Decree in the original Suit, until a Decree had been obtained in the present Suit.

The Bill prayed that it might be declared that the younger Children were not entitled to the Portions under the Settlement and also to the Portions under the Will and Codicil; and that it might be declared that they had elected to take the former and that the Plaintiff was entitled to the latter, or that the younger Children, or such of them as should be held not to have elected, might be ordered to elect; and that the Plaintiff might be declared to be entitled to such of the Portions as they should not have elected, or should not elect to take; and that the Will might be established and the Trusts thereof performed; and that the Real Estates which passed by the Will and Codicil might be sold, and that the clear Residue of the Proceeds

* See *Gillibrand v. Goold*, ante, Vol. 5, page 149.

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thereof, after paying such of the Testator's Debts as were properly charged thereon, might be ascertained.

The Testator's Widow, Sir *George Goold*, and three of the younger Children who were adult, demurred, generally, to the Bill.

Sir *E. Sugden* and Mr. *Parry*, in support of the Demurrer.

In the Will and Codicil the Testator shows the greatest anxiety to dispose of everything that he could dispose of. Having sufficiently provided for

his eldest Son by his Settlement, he meant, by his Will, to give [*599] *everything that he could dispose of, for the benefit of his younger Children. By his Will he directs that certain Articles shall be considered as Heir looms, and he devises all his Lands which might not be subject to Settlement. So that, when he made his Will, he had his Settlement in view; and, consequently he could not intend that what he gave by his Will, should be a Satisfaction of the Provision under the Settlement. The Provision by the Will, is for all the Testator's younger Children; the Provision by the Settlement is for the younger Children of the Marriage only. It is always difficult to raise a Case of Satisfaction against a class of Persons; but it is still more difficult, if not impossible where the Class is not the same. The Estates are not to be sold until the expiration of Six Months after the Testator's death. Under the Will, if a Child, whether a Son or a Daughter, dies under 21 leaving Issue, the Issue will take both the surviving and original Shares of their Parent. By the Settlement, if a Son dies under 21 leaving Issue, his Share will go to his surviving Brothers and Sisters. There is no Maintenance-clause in the Will; so that the Testator intended to throw the Children on the Maintenance-clause in the Settlement. There is no Case in which Land, or Land devised to be sold, has been held to be a Satisfaction of a Portion. *Grave v. The Earl of Salisbury* (a). In *Rickman v. Morgan* (b) the Gift of a Residue was held to be a Satisfaction of a Portion; but there it was provided, by the Settlement, that, if the Father should, in his lifetime, or at the time of his death, give, to any of his younger Children, Money or Lands, for advancement *in Marriage or otherwise, the Value thereof should be deducted from their Portions. Those words left the question clear from all doubt. The Case of *Bengough v. Walker* (c) was decided on the evident intention of the Testator.

Mr. *Knight* and Mr. *Spence*, in support of the Bill:

There is a specific Provision, in the Settlement, that, if the Father should advance any of his younger Children in his lifetime, such Advancement should be a Satisfaction of their Portions, unless the Father, should, by writ-

(a) 1 Bro. C. C. 425.

(b) 1 Bro. C. C. 63; 2 Bro. C. C. 388, 394.

c) 15 Ves. 507.

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ing under his hand, direct the contrary : and it is quite settled that a Provision by Will is an Advancement by the Testator in his lifetime. *Leake v. Leake* (d), *Goolding v. Haverfield* (e). Where, as in this Case, the Settlement declares that an Advancement shall be a Satisfaction of the Portion, you have not to inquire as to the intention of the Party in making the Advancement. The Testator, having the Settlement in his mind, did not think it necessary to repeat what the Settlement had declared.

[*The Vice-Chancellor* :—Where the Settlement declares that an Advancement shall be a Satisfaction unless the contrary is declared, and an Advancement is made without any such Declaration, the Court is at liberty to infer, from the Instrument that creates the Advancement, that it was not intended to be a Satisfaction.]

There is no reason why Land directed to be converted *into [*601] Money, should not be an Advancement ; and, if it is an Advancement, it is a Satisfaction. *Leake v. Leake* decides that an unascertained Fund may be a Satisfaction of a Portion. The ground of the decision in *Twisden v. Twisden* (f) was not that the Fund was unascertained, but that there was an Intestacy. In deciding on questions of Satisfaction, slight circumstances of difference between the two Provisions, are not to be taken into consideration. The Testator uses the word ‘ Portion ’ in his Will : and, although the Provision by the Will is not confined to the Children of the Marriage, but extends to all the Children that the Testator might have, yet the Children of the Marriage must have been, at all events, entitled to a Share of the Provision under the Will, and the only effect of letting in the Children of a subsequent Marriage, would have been that the Shares of the Children of the first Marriage, would have been diminished in amount.

This Case is decided by *Rickman v. Morgan*, in which all the same difficulties were raised, as have been raised in the present Case (g).

The VICE-CHANCELLOR :

It hardly can be supposed that the Testator, when he made the Provision by his Will, was contemplating the Children of a subsequent Marriage, because, by his Will, he gives a Legacy to his Wife.

I do not know that it ever has been decided, where Portions have been provided for younger Children as in this Settlement, and the Father has, afterwards, by his *Will, given to them a Sum of [*602] Money to arise from the sale of Real Estate, that that Provision should not be a Satisfaction of the Portions. I see no substantial difference between Money to arise from the sale of Real Estate, and from the sale of

(d) 10 Ves. 507.

(f) 9 Ves. 413.

(e) Maclel. 345 ; S. C., 13 Price, 593.

(g) See 2 Bro. C. C. 396.

 1831.—*Jenkins v. Briant.*

Personal Estate, which may include Chattels Real: and it has been decided that a Gift of the Residue of Personal Estate, may be a Satisfaction.

It would however be premature to decide the Question, until it has been ascertained whether there is any Fund remaining after payment of the Testator's Debts, which may be a Satisfaction. It seems to me, therefore, necessary that the Cause should go on to a hearing, and the Demurrer must be over-ruled (*h*).

[*603]

*JENKINS v. BRIANT.

1834: 30th April.—*Practice*.—*Exception to Report.*

Where a *Master* reports as to matter not referred to him, his Report ought not to be excepted to; but it ought to be referred back to him to be reviewed; and, even if that is not done, the unwarranted finding will be disregarded.

Specialty Debt.—*Annuity.*

Where a Testator has entered into a voluntary Covenant to Pay an Annuity, the Annuitant is a Specialty Creditor on his Real Estates, although the Annuity did not become in arrear till after the Testator's death.

THIS was a Suit to establish the Will of *John Briant*, who died in 1823, and to carry the Trusts of it into execution.

By the Decree, The *Master* was directed to take an Account of the Testator's Debts and Legacies, and of the Charges and Incumbrances affecting his Real Estates.

It appeared that the Testator was seised of a Freehold Estate situate at *Maudlin's Rents, East Smithfield, Middlesex*, and of another Freehold Estate called the *Berwick and Leith Wharf* Estate, both of which he devised to his Wife and his Sons *W. H. Briant* and *C. Briant*, and *W. Back*. It also appeared that, some years before his death, he had voluntarily granted to each of his Sons-in Law, the Plaintiff *J. R. Jenkins* and the Defendant *Jeremiah Evans*, an Annuity of 100*l.*, issuing out of his *Maudlin's Rents* Estates; and that he had entered into Covenants with them for payment of their respective Annuities. The *Maudlin's Rents* Estate had been purchased by the *St. Catherine Docks Company*, and the Purchase-money was paid into the Court of Exchequer, under the Act of Parliament for making those Docks. The Annuities did not become in arrear until some time after the Testator's death.

[*604] The *Master* reported that the Annuities and the *Arrears thereof, were charges on the Proceeds of the *Maudlin's Rents* Es-

(*h*) See *Powys v. Mansfield*, ante, 528.

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tates, and that *Jenkins* and *Evans* would be Specialty Creditors, by *Covenant*, upon the *Berwick and Leith Wharf* Estate, for any deficiency of the Proceeds of the *Maudlin's Rents* Estate to secure the Annuities and the Arrears and future Payments thereof.

The Defendant *Mary Briant*, the Testator's Widow, excepted to the Report, insisting that The *Master* ought not to have certified that *Evans* and *Jenkins* were and would be Specialty Creditors of the Testator; and, if he ought to have certified that they were and would be Specialty Creditors, that he ought not to have certified that they were and would be Specialty Creditors, by *Covenant*, upon the *Berwick and Leith Wharf* Estate.

The *Solicitor-General* and Mr. *O. Anderson*, in support of the Exception, contended, First: that the Annuitants could not be Specialty Creditors of the Testator, as nothing was due to them at the Testator's death. *Wilson v. Knubley* (a). Secondly: that The *Master* had found that the Annuitants were Specialty Creditors whose Debts affected a particular Estate of the Testator, as to which no Inquiry was directed by the Decree.

Mr. *Garratt* and Mr. *Tamlyn* also appeared to support the Exception; but the Court refused to hear them, as their Client had not excepted to the Report.

*Sir *E. Sugden*, Mr. *Knight*, Mr. *Koe* and Mr. *Campbell*, [*605] in support of the Report :

Wilson v. Knubley has nothing to do with this Case. There, it was decided that an Action of Debt could not be maintained on a Covenant for Title, as Damages only could be recovered for a Breach of the Covenant. There is no doubt that an Action of Debt may be maintained on a Covenant to pay a certain Sum or a Sum the Amount of which may be ascertained. The obligation existed at the Testator's death, though nothing was then due. As soon as any thing became due, it was a Specialty Debt. The Covenant in this Case precisely resembles a Bond, which, though not due at the Testator's death, the Heir or Devisee is bound to pay as soon as it becomes due. *Bac. Ab. Debt. Com. Dig. Debt* (A. 4.) *Wilson v. f.c. (b)*: *Tanner v. Byne* (c); *Jeuwine v. Agate* (d).

The VICE-CHANCELLOR :

It is laid down, in one of Lord *Bacon's* Orders (e), that if a *Master* reports as to a matter which is not referred to him, his Report, so far as it relates to that matter, is to be treated as a nullity. In such a Case, however, the proper course is not to except to the Report; but, before it is confirmed, to apply to the Court that it may be referred back to The *Master* to review his Report. But if no such Application should be made, and the Report

(a) 7 East, 128.

(b) Hard. 332.

(c) *Ante*, Vol. I., page 160.(d) *Ante*, Vol. III., page 129.(e) *See Beames's Ord.* 23.

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should be confirmed, the Court would pay no attention to it, except so far as it was warranted by the Decree.

[*606] *Here The *Master* was directed to take an account of the Testator's Debts; but he was not directed to inquire whether there were any Specialty Debts affecting any particular Estate: and, instead of finding, merely, that these Annuitants were Specialty Creditors, he has reported that they have a Lien on a particular Estate.

The *Master* was right in reporting that the Annuitants were Specialty Creditors; but he had no authority to find that their Annuities were Charges on any particular Estate. It was, however, irregular to except to his Report on that account: and, therefore, on both grounds, the exception must be over-ruled.

The Cause now came on to be heard for further Directions.

The Question was whether, under the Statute of Fraudulent Devises (*f*) The *Berwick and Leith Wharf* Estate, was chargeable, in the hands of the Devises, with the deficiency of the Proceeds of the *Maudlin's Rents* Estate, to answer the Arrears of the Annuities.

Mr. *Jacob* and Mr. *Campbell*, for the Plaintiffs, said that the Covenants entered into by the Testator, were for payment of certain ascertained Sums of Money, and, therefore, they constituted a Debt against the Testator's Real Assets, whether devised or not.

Mr. *Wigram* and Mr. *O. Anderdon*, for the Defendant, Mrs. *Briant*:
[*607] *The Annuities are Charges on the *Maudlin's Rents* Estate alone, and not on the *Berwick and Leith Wharf* Estate, which is devised away. The Covenants were voluntary, and were entered into not for the payment of gross Sums, but of Sums, *de anno in annum*; and there were no Arrears at the Testator's death. The Testator died before the passing of the late Act (*g*) which, for the first time, rendered Devises of real Estates void as against Covenanters. *Wilson v. Knubley* (*h*); *Lomas v. Wright* (*i*); *Farley v. Briant* (*k*).

Mr. *Duckworth*, Mr. *Cooper*, Mr. *Tamlyn*, Mr. *James Parker*, and Mr. *Rudall* appeared for the other Defendants.

Mr. *Jacob*, in reply:

In *Morrant v. Gough* (*l*) the Annuity was not in Arrear at the death of the Devisor; but it was decided that the Devisee, if he had been a Devisee in Fee, would have been liable to pay the Annuity so long as it lasted: as, however, the Estate was devised to him during the Infancy only of the Tes-

(*f*) 3 W. & M. chap. 14.

(*i*) 2 Myl. & Keen, 769.

(*g*) 11 Geo. 4 & 1 Will. 4. c. 47.

(*k*) 5 Nev. & Mann. 42.

(*h*) 7 East, 128.

(*l*) 7 B. & C. 206.

1834.—Ewing v. Osbaldiston.

tator's Son, it was held that he was liable to pay the Annuity during the period only for which he had the Land.

The VICE-CHANCELLOR:

The Question comes to this; whether a Person who Covenants to pay a specific Sum of Money, *de anno in annum*, is not liable to an Action of Debt. The reason of the decision in *Wilson v. Knubley*, was that the 3d W. & M. c. 14, in the 3d Section, speaks of an Action of [*608] Debt. There the Covenant was contingent, and unascertained Damages only could be recovered for a Breach of it. Here the Covenants are absolute, and the Sums to be recovered are certain. Declare that the *Berwick and Leith Wharf* Estate is chargeable with the Arrears of the Annuities, in the hands of the Devises.

EWING v. OSBALDISTON.

1834: 1st May.—*Production of Documents.—Defendant.*

If a Defendant makes Statements in his Answer sufficient to show that he has incurred Penalties, he cannot refuse to produce Documents referred to in it, on the ground that they afford Evidence of his being subject to the Penalties.

THE Bill was filed to have the Accounts taken of a Partnership, between the Plaintiff and the Defendant, in the *Surrey Theatre*. The Defence made by the Answer, was that the Partnership Business was illegal. The Defendant, however, did not refuse to answer any of the Allegations in the Bill, but stated circumstances sufficient to show that the Parties had incurred the Penalties imposed by 10 Geo. 2, c. 28.

The Plaintiff now moved that the Defendant might be ordered to produce certain Books and other Documents referred to in the Answer.

The Motion was resisted on the ground that the Court would not compel a Defendant to make a Discovery which would subject him to Penalties.

*Sir E. Sugden and Mr. Stuart, in support of the Motion, cited [*609] *Green v. Weaver* (a); *Nash v. Ash* (b).

Mr. Beames and Mr. Carpenter, for the Defendant, referred to *Nelme v. Newton* (c); *The King v. Glossop* (d); *The King v. Neville* (e).

The Vice-Chancellor said that this Case did not come within the principle of *Nelme v. Newton*; for, there, the Defendant had insisted that he ought not to be compelled to Answer as to the alleged Partnership; but, in this

(a) *Ante*, Vol. I, 404.

(b) 1 Eden, 378.

(c) 2 Youn. & Jerv. 186, Note.

(d) 4 Barn. & Ald. 616.

(e) 1 Barn. & Adol. 489.

1834.—*Palmer v. Leicester, Booth and Others.*

Case, the Defendant had made admissions in his Answer, which clearly showed that he had incurred the Penalties of the Act, and, consequently, that he could not be damnified by a production of the Documents.

Motion granted.

[*610] *PALMER *v.* LEYCESTER, BOOTH AND OTHERS.

1834: 6th May.—*Practice.—Cause and Cross Cause.*

A. filed a Bill against *B.* which *B.* answered, and then filed a Cross Bill against *A.*—*A.* not having answered the Cross Bill, *B.* issued an Attachment against him, but was unable to serve it, as *A.* was resident abroad. *A.* proceeded to examine Witnesses in his Cause.

The Court on the Application of *B.* ordered Publication not to pass in *A.*'s Suit, until he should have put in his Answer and cleared his Contempt in *B.*'s Suit, and the Court should order Publication to pass.

ON the 21st of January 1833, *James Booth*, on behalf of himself and the other Creditors of *Sir John Palmer*, deceased, filed a Bill against *Ralph Leicester* and others, for the purpose, amongst other things, of having the Produce of certain Property, called *The Hanway Street Property*, applied in discharge of the Incumbrances affecting the same.

On the 13th March 1833, the Plaintiff, *Sir Wm. Palmer*, filed the Bill in this Cause, to establish his right to the same Property and the Accumulations thereof, and to have the Produce applied in discharging the Incumbrances thereon.

Booth and the other Defendants filed their Answers to *Sir Wm. Palmer's* Bill, in July 1833; and those Answers were not excepted to.

On the 6th of November 1833, *Booth* amended his Bill by making *Sir William Palmer*, (who was the Heir-at-Law of *Sir John Palmer*), a Defendant. *Sir Wm. Palmer* took out all the Orders for time to Answer that Bill. The last Order expired on the 14th of February 1834; and, then, *Booth's* Solicitor, at the request of *Sir Wm. Palmer's* Solicitor, allowed *Sir William* additional time for putting in his Answer. That time having expired without the Answer being filed, *Booth*, on the 15th of April 1834, issued an Attachment against *Sir William*, but was unable to execute

[*611] it owing to *Sir William* being resident abroad. On the 8th of March 1834, *Sir William* replied to his Cause, and, shortly afterwards, served Subpœnas to rejoin; and he was proceeding to examine his Witnesses.

Booth now moved that *Sir Wm. Palmer* might be restrained from all further Proceedings in his Cause, until he should have put in his Answer and cleared his Contempt in *Booth's* Suit: or that Publication might not

[1834.—Palmer v. Leycester, Booth and Others.

pass in Sir *William's* Cause, until he should have put in his Answer and cleared his Contempt, and the Court should order Publication to pass.

Sir *E. Sugden* and Mr. *Wakefield* in support of the Motion :

The *Solicitor-General* and Mr. *Lovat* for Sir *William Palmer*.

Sir *William* was not made a Party to *Booth's* Suit until November 1833 ; and, therefore, *Booth* never had a right to compel Sir *William* to answer his Bill, before he answered Sir *William's* Bill ; and, if *Booth* ever had any such right, he lost it by amending his Bill. *Nole v. King* (a).

Sir *E. Sugden* in reply :

Nole v. King does not touch this Case. It decides, merely, that a Plain-tiff in an original Cause, by amending his Bill, loses his right to compel an Answer to it before he answers the Cross Bill. *Booth* has answered Sir *William's* Bill ; but Sir *William* is going on to publication in his own Suit, before he has answered *Booth's* Bill.

It is admitted, by the Affidavit made by Sir **William's* [*612] Solicitor, that both Suits are for the same object. *Booth* cannot examine his Witnesses properly, without having Sir *William Palmer's* Answer and a production of Documents in his possession : but Sir *William* is examining his Witnesses with the advantage of the Discovery which he has had from *Booth*.

Besides, he was allowed further time to put in his Answer, by which *Booth's* Suit was delayed : he did not, however, keep his engagement. That ground is, of itself, conclusive.

The VICE-CHANCELLOR :

Sir *William Palmer* filed his Bill on the 13th of March 1833. The last Answer in that Cause was filed in July 1833. Long before the time for passing Publication arrived. Mr. *Booth* filed his Cross Bill against Sir *William Palmer*, by amending his Bill. This was done on the 6th of November 1833. Up to this time Publication has not passed in the original Cause ; and the Discovery is not wanted for *constructing* the Defence in the original Cause ; but it may be material for *supporting* the Defence in the original Cause. It would be strange to say that Sir *William Palmer* is to go on with his Suit, at the same time that he withholds his Answer from the Plain-tiff in the Cross Cause.

Order made according to the second alternative of the Notice of Motion.

(a) 2 Madd. 392.

1834.—Berkeley v. Swinburne,

[*613]

*BERKELEY v. SWINBURNE.

1834: 2d May.—Will.—Construction.—Maintenance.

A Testator gave his Residuary Estate to Trustees, in Trust for his Sister's younger Children equally, and to vest in them at the usual periods; and he directed his Trustees, during the Minorities of the Children, to pay the Interest of their Shares, to his Sisters or to the Guardians of the Children, to be applied for their Maintenance and Education. Held that the sisters were entitled to receive the Interest of their Children's Shares during the Minorities of their Children.

PAUL FRANCIS BENFIELD, Esq., by his Will, dated the 21st of April 1827, gave his Residuary Real and Personal Estate in Trust to sell and convert the same into Money, and to invest the Proceeds in the usual Securities in their own names: and he directed his Trustees to stand possessed of the Trust-Funds, in Trust for his Mother, for her life, and, after her decease, in Trust for all the Children (if there should be more than one) of his Sisters *Henrietta Sophia*, the Wife of *Robert Berkeley*, Esq., and *Caroline Martha*, the Wife of *Grantley Berkeley*, Esq. (exclusive of an eldest or only Son), or, if there should be no Son of either of his Sisters, exclusive of an only Daughter of either of them, to take in equal Shares, as Tenants in Common, absolutely, and to be vested Interests in Sons at 21 and in Daughters at that age or Marriage: and, in case any of the said Children should die without having attained Vested Interests, then in Trust for the others of them; or, in case there should be, originally, only one Child of his Sisters besides an eldest or only Son of each of them, or besides an eldest or only Son of one of them and an only Daughter of the other of them, then in Trust for such only Child absolutely: but in case there should be no Child who should attain a Vested Interest under the Trusts aforesaid, then in Trust for the only Son or only Daughter of his sister, *Henrietta Sophia*, and the only Son or only Daughter of his Sister, *Caroline Martha*, as Tenants in Common, absolutely: but in case there should be no Son or Daughter of either of his Sisters who should attain a Vested Interest

[* 614] in the Trust-Funds, *then in Trust for the only Child of the other of his Sisters absolutely: and in case there should not be any Child of either of his Sisters who should attain a Vested Interest, then in Trust for his Next of Kin.

“ Provided always that it shall be lawful for the Trustees or Trustee for the time being of this my Will, during the life of my said Mother with her consent, and, after her decease, at the request of my said Sisters respectively, or of the respective Guardians for the time being of the Child or Children of my said Sisters respectively, in case my said Sisters shall respectively have departed this life, to apply, settle or appropriate the whole or

1834.—Berkeley v. Swinburne.

any part of the principal Trust-Monies to which, under the Trusts hereinbefore contained, such Child or Children respectively shall be entitled, for or towards the Advancement in the world or otherwise for the Benefit of such Child or Children respectively, either by way of Marriage Portion or in any other manner, with and under such Conditions and Restrictions, or without any Condition or Restriction as, to my said Sisters respectively or the said Guardians respectively, shall seem expedient, notwithstanding such Child or Children respectively, being Son or Sons, shall not have attained the age of 21 Years, or, being a Daughter or Daughters, shall not have attained that age or have been married."

"Provided also that, in case, at the death of my said Mother, any Child or Children of my said Sisters respectively who, under the Trusts hereinbefore contained, may be entitled to any Vested or Presumptive Share or Shares of the said Trust-Monies, &c., shall not, being a Son or Sons, have attained the age of 21 Years, or, being a Daughter [*615] or Daughters, have attained that age or have been married, then the Trustees or Trustee for the time being of this my Will, shall place out or continue at Interest on the Security or Securities aforesaid, and, from time to time, call in and replace out the Share or Shares of such Child or Children respectively, and pay the Dividends, Interest and Produce of the Share of each such Child or Children respectively, being a Son or Sons, during his Minority, or, being a Daughter or Daughters, during her Minority and Discoveriture, unto my said Sisters respectively; or, in case of their deaths respectively, unto the Guardians for the time being of such Child or Children respectively, to be applied in and towards the Maintenance and Education of such Child or Children respectively or otherwise for their respective Use and Benefit."

The Testator died in May 1828, and his Mother died in August following. *Henrietta Sophia Berkeley* had nine Infant Children, four of whom were born before the Testator's death: and *Caroline Martha Berkeley* had Two Infant Children, both of whom were born before that event. The Suit was instituted by their Younger Children born before the Testator's death, praying that the Will might be established and the Trusts performed. The question was whether, under the Will, the Testator's Sisters were entitled to receive the Income of the Younger Children's Shares of the Trust-Funds, notwithstanding their Fathers might be of ability to maintain them.

Mr. *Barlow* for the Plaintiffs:

A Father, if he is able, is bound to maintain his children, notwithstanding a Fund may be provided for their Maintenance.

"In *Hamley v. Gilbert* (a) the Testatrix directed that the re- [*616]

(a) Jac. 354.

1834.—*Berkeley v. Swinburne.*

sidue of the Monies arising from her Estate and Effects, which she had before directed to be paid over to her Niece, should be laid out and expended by the Niece, at her discretion, for or towards the Education of her Son, and that she should not be liable to account for the application of it: and the Court held that she was entitled to the residue, subject to the application of so much as the Court might think fit, to the Education of her Son. In *Hammond v. Neame* (b) a Sum of Stock was given to a Trustee, in Trust to pay the Dividends into the hands of the Testator's Niece, for the Maintenance of her children. The Niece had no children, which must have been known to the Testator, her Uncle. And the Court held that the children were not direct objects of bounty, but only the occasion of bounty to the Niece. Both those cases were decided on the particular expressions used in the Wills on which they arose: and all that *Hammond v. Neame* decided, was that, so long as there was no child, the Testator's Niece was entitled to receive the Dividends of the Stock for her own Benefit. Here the Testator has created a Fund for the Maintenance of the children, and has directed it to be applied for that purpose by a particular person. The Mother and the Guardian are mentioned in the same sentence. In case the Mother dies, is the Guardian to receive and spend the Interest of the children's Shares?

Sir W. Horne, Sir E. Sugden, Mr. Swanston, Mr. Matthews, Mr. Daniell, Mr. Lowndes, Mr. Kindersley, Mr. Wigram, Mr. Pole, and Mr. Winterbottom, appeared for the different Defendants.

['617] *But the VICE-CHANCELLOR, without hearing them, said :

I think that, notwithstanding the Testator has mentioned the Guardians in their official capacity, he has used language which shows that he intended to give his Sister a beneficial Interest in the Income of their Children's Shares of his Residuary Estate, during the Minorities of the Children.

The Decree declared that, according to the true construction of the Will, the Defendants *Henrietta Sophia Berkeley* and *Caroline Martha Berkeley*, were respectively entitled to receive the Interest arising from the Shares of their respective younger Children, of and in the Testator's Residuary Estate, during their Minorities respectively; but without prejudice to the question as to what Children might be ultimately entitled to share in the Testator's Residuary Estate.

(b) 1 Swanst. 35.

1834—Landars v. Allen.

RHODES v. WARBURTON.

1834: 26th May.—*Pleading*.—*Parties*.

A Bill is not demurrable, because the Legatees of a Testator, join with his Executor, in suing for a Debt due to his Estate.

MOSES RHODES, by his Will, gave all his Estate and Effects to his Nephews and Nieces living at his death, and appointed *George Rhodes* and *John Rhodes* since deceased, two of his Nephews, his Executors.

The Bill was filed by *George Rhodes* and the other surviving Nephews and Nieces of *Moses Rhodes*, and by the Personal Representative of his deceased Nephews and Nieces living at his death, against *Thomas Warburton*, alleging a Partnership to have subsisted *between ['618] the Defendant and *Moses Rhodes*; and praying that the Affairs of the Partnership might be wound up, and that the Amount of the Share and Interest of *Moses Rhodes* therein and in the Profits thereof, might be ascertained and paid to *George Rhodes*, as the surviving Executor of *Moses Rhodes*, for the Benefit of himself and the other Plaintiffs.

The Defendant put in a general Demurrer.

Mr. *Knight* and Mr. *Wright*, in support of the Demurrer:

The Executor represents both the Legal and Beneficial Ownership of the Testator's Property. *Non constat* that any part of the Testator's Property, will come to his Legatees; for his Creditors are to be first satisfied. The Rule is that a Legatee or Creditor cannot sue for a Debt due to the deceased, unless there is collusion between the Executor and the Party sued. Besides, in the course of the Cause, we shall be under the necessity of examining some of the Co-Plaintiffs as Witnesses.

Sir *E. Sugden* and Mr. *Stuart*, appeared in support of the Bill.

But the VICE-CHANCELLOR, without hearing them, said:

Legatees cannot file a Bill against a Debtor to their Testator's Estate, unless there is collusion between the Executor and the Debtor. But, if the Executor chooses to make the Legatees Co-Plaintiffs with him, I do not think that that superfluity renders the Record not sustainable. Persons are brought here who are not necessary Parties to the Suit; but it is not so injurious as to make the Bill *not sustainable: it is not ['619] an Objection that a Defendant can take.

Demurrer over-ruled.

 1834.—*Landars v. Allen.*

LANDARS v. ALLEN.

1834 : 29th May.—*Practice.*—*Contempt.*

An Attachment had issued against a Defendant for want of Answer. The Answer was afterwards filed, and the Defendant took an Office Copy of it, the Costs of the Contempt remaining unpaid. Held that the Plaintiff had waived his right to enforce Payment of the Costs by Process of Contempt.

An Attachment had issued against the Defendant, for want of Answer. The Answer was afterwards filed, and the Plaintiff took an Office Copy of it : but the Defendant had not paid the Costs of his Contempt.

Mr. *Spence*, for the Defendant, now moved to dismiss the Bill for want of Prosecution.

Sir *E. Sugden*, for the Plaintiff, said that the Defendant was not entitled to move, as he had not paid the Costs of the Attachment.

Mr. *Spence* replied that the Plaintiff, by taking an Office Copy of the Answer, had waived his right to enforce payment of the Costs by process of Contempt. *Anon* (a) : *Smith v. Blofield* (b) ; *Const v. Ebers* (c).

The Motion was mentioned again on this day, Sir *E. Sugden*, who referred to *Watson v. Fairlie* (d), said that the Officers of the [*620] Court had been consulted, and that they were unanimously of opinion that the taking of an Office Copy of the Answer, was not a Waiver of the Contempt.

The *Vice-Chancellor*, after taking time to consider the Question, decided that the Defendant, by taking the Office Copy, had waived his right to enforce payment of the Costs by Process of Contempt, and that the Defendant was entitled to make his Motion.

1834 : 26th November.—*Practice.*—*Order.*

By a mistake in The Registrar's Office, an Order made on an undertaking to Speed, was erroneously drawn up. The Order was discharged, with Costs of the Application to discharge it; it being the duty of the Party who procures an Order, to see that it is properly drawn up.

The Plaintiff having undertaken to speed, an Order, dated the 29th of May 1834, (which was in Trinity Term) was drawn up, by which it was ordered that the Plaintiff should file a Replication, serve Subpœnas to re-

(a) 15 Ves. 174.

(b) 2 V. & B. 100.

(c) 1 Madd. 530.

(d) Reg. Lib. B. 1824 fo. 1581.

1834.—Norman v. Baldry.

join, and obtain and serve an Order for a Commission to examine Witnesses, if he required such Commission, within three Weeks from the date of the Order, and give Rules to produce Witnesses and pass Publication in *Michaelmas* Term, and set the Cause down for Hearing and serve Subpœnas to hear Judgment in *Hilary* Term, or, in default thereof, that the Bill should stand dismissed.

Sir *E. Sugden*, for the Plaintiff, now moved to discharge the Order, for Irregularity, with Costs, on the ground that *Michaelmas* Term was inserted in it, instead of *Hilary* Term, and *Hilary* instead of *Easter* Term (a).

Mr. *Knight* and Mr. *Spence*, for the Defendant, admitted that the Order was erroneous, but said that the mistake arose in the [*621] Registrar's Office, and that the Order ought to be corrected and not discharged.

The VICE-CHANCELLOR :

It is the duty of the Party who procures an Order, to see that it is properly drawn up; and, if he allows an irregular Order to be drawn up, he must pay the Costs of discharging it.

Motion granted.

NORMAN v. BALDRY.

1834: 2d June.—*Executor.—Administrator.*

An Executor will be allowed Payments made by him to simple Contract Creditors of his Testator, a Bond being in existence but not payable; but he will not be allowed Payments to Legatees, notwithstanding he had no notice of the Bond.

On the Marriage of *William Baldry* with *Ann Freston*, he, together with *Simon Baldry*, executed a Joint and Several Bond, dated the 7th of October 1802, to *W. Lewis*, conditioned for the payment, by the Heirs, Executors or Administrators of *William Baldry*, within Three Months after his decease, of 490*l.* to *Ann Freston*, in case she should survive him; but, in case she should die in his lifetime, then for the payment by him, of 200*l.* within Six Months after the death of *Ann Freston*, to the Persons therein named.

Simon Baldry died in March 1820. *Ann Baldry* died in April 1831, leaving her Husband her surviving.

William Baldry having become Insolvent, the Persons entitled to the 200*l.* under the Bond, filed, in 1832, a Creditor's Bill against the Executors of *Simon Baldry*.

*The Executors, in their Answer, said that they had applied [*622] the whole of *Simon Baldry's* Personal Estate in payment of his

(a) See 16th and 17th Orders of 1831.

1834.—Holland v. Sproule.

Debts and Legacies: and that they never heard of the Bond until October 1821.

Mr. *Knight* and Mr. *Spence* for the Plaintiffs.

Sir *E. Sugden* and Mr. *Thomson*, for the Defendants, the Executors of *Simon Baldry*, said that, as the Plaintiffs had suffered Nine years to elapse, without giving the Executors any notice of the Bond, they were not entitled to sue the Executors. In *The Governor and Company of the Chelsea Water-works v. Cowper (a)*, Lord *Kenyon* expresses it to be his opinion that, where an Executor has paid his Testator's Debts and Legacies, and paid over the remainder of the Estate to the Residuary Legatee, and has had no notice of any other subsisting demand, provided he had not done it too precipitately, it was a good Answer to an Action on a Bond. The Statute having directed that no Legacies should be claimed before the end of One year from the Testator's death, seems to have meant to give that time for Creditors on the Estate to make their Claims, or, at least, to give notice to the Executor that there were such Claims subsisting.

Mr. *Bridger* and Mr. *Bichner* appeared for other Defendants.

The *Vice-Chancellor* said that he had always understood the Law to be that an Executor who had paid simple Contract Creditors of his [*623] Testator, a Bond being in existence but not then payable, ought to be allowed those Payments; but that an Executor was liable, if he paid the Legatees, notwithstanding he had no notice of the Bond (b): and that he was not disposed to agree to what was attributed to Lord *Kenyon* in the Case cited.

HOLLAND v. SPROULE.

1834: 3d June.—*Plea and Pleading.—Account.—Release.*

A. died Indebted to *B.*

C. took out Administration to *A.*, got in his Estate and afterwards died. *D.* took out Administration to *A.*—*B.* filed a Bill against *D.* and *C.*'s Executor, for an Account of *A.*'s Estate possessed by *D.* and by *C.* The Executor pleaded an Account stated by him to *D.* after the filing of the Bill and a Release executed to him by *D.* on Payment of the Balance; but did not annex the Account to his Plea. Held that the Plea was not double; and that it was not necessary to annex the Account to the Plea.

WILLIAM PHELPS died in 1825, being, at his death, indebted, on Bond, to the Plaintiff. In 1827, Letters of Administration to the deceased, with his Will annexed, were granted to *Betsy Olive*. *Betsy Olive* died in 1829, having got in the Testator's Estate, and having appointed the Defendant,

(a) 1 Espin. N. P. 6. 278.

(b) See *Hawkins v. Day*, Amb. 160.

1834.—Holland v. Sproule.

Sproule, her Executor; and he proved her Will and got in her Estate. In 1831 Letters of Administration *de bonis non* of *Phelps*, were granted to the Defendant *Prior*.

The Bill, which was filed on the 11th of July 1831, prayed for an account of what was due on the Bond, and also for an account of *Phelps's* Estate possessed by *Betsy Olive* and *Prior*.

Sproule pleaded that he had come to an account, with *Prior*, in respect of *Phelps's* Estate possessed by *Betsy Olive*, and that a Balance of 471*l.* was found due to *Phelps's* Estate, and that, on the 6th of August 1831, he paid that Sum to *Prior*: and that, by a Deed Poll [*624] dated the same day, after reciting (amongst other things) that *Prior* having required *Sproule*, as the Executor of *Betsy Olive*, to account for *Phelps's* Estate come to her hands, *Sproule* had rendered, to *Prior*, an Account marked A. bearing even date with the Deed Poll, by which a Balance of 471*l.* appeared to be due from *Betsy Olive's* Estate to *Phelps's* Estate, and that *Prior* had examined and approved of the Account, as he thereby acknowledged: It was witnessed that, in consideration of the 471*l.* paid to *Prior* by *Sproule*, *Prior* released *Sproule*, as the Executor of *Betsy Olive*, from all Claims and Demands in respect of *Phelps's* Estate. The Plea concluded by setting forth the Receipt for the 471*l.* indorsed on the Deed Poll.

Sir *E. Sugden*, and Mr. *Stinton*, in support of the Bill:

First: The Plea is Double. It consists of a stated Account, and also of a Release; either of which would have been a sufficient Plea by itself.—Secondly: The Defendant ought to have annexed the Account to his Plea. It was rendered to a third Party, and the Plaintiff knows nothing of it. *Hankey v. Simpson (a)*.—Thirdly: The Account was rendered after the Bill was filed, in order to prevent the Suit. The Court will not support such an Account and Release, as against Creditors.

Mr. *Knight* and Mr. *Wakefield* for the Plea.

The VICE CHANCELLOR:

The Account and Release must be taken together. *What [*625] the Plea states as to the Account, is nothing more than an Averment that the recitals of the Release are true.

The Bill does not, and, indeed, could not seek to impeach the Account, which was not rendered until after the Bill was filed; and, therefore, it was not necessary to annex the Account to the Plea.

The Account and the Release constitute one fact, which will be a bar to the Suit as against the Defendant *Sproule*: and, therefore, I think that the Plea ought to be allowed.

1831.—Tasker v. Small.

TASKER v. SMALL.

1834: 15th July.—Deed.—Construction—Power of Sale.

A. being Tenant in Tail of an Estate, in remainder expectant on the death of B., entered into Articles, on his Marriage, by which, after reciting that it had been agreed that the Estate should, subject to B.'s Life-Interest therein and to the raising, *Mortgage or otherwise*, of any Sum or Sums not exceeding 15,000*l.*, for A.'s use, be settled to the uses thereafter expressed, he covenanted that he would, subject to the raising, by any ways or means and at any time or times he should think proper, of the Sum or Sums before-mentioned, by *Mortgage, Annuity, or otherwise*, for his own benefit, and to any Deed or Deeds he might make for securing the repayment thereof and Interest, do all necessary acts for settling the Estate, subject to B.'s Life-Interest, in the manner agreed upon. Held that A. was authorised to raise the 15,000*l.* by Sale; and that he was justified in selling his Interest in remainder in the whole of the Estate, as the 15,000*l.* was nearly the full value of such Interest.

ARTHUR GEORGE SMALL being Tenant in Tail Male of certain Estates, subject to the Life-Estate of *Martha Lucas* therein, by Articles [*626] of Agreement dated the 3d of December 1830, after *reciting an intended Marriage between *Small* and *Matilda Webb Edwards*, and that, upon the Treaty for the Marriage, it was agreed that the Estates should (subject to the Estate for Life therein of *Martha Lucas*, and to the raising, by *Mortgage or otherwise*, of any Sum or Sums of Money, not exceeding, in the whole, the Sum of 15,000*l.*, by and for the said *Arthur George Small*) be conveyed to the uses, and upon and for the Trusts, &c. thereafter expressed: It was witnessed that *Small* did, thereby, for himself, his Heirs, &c., covenant with *Charles Samuel Ashford*, the Lady's Uncle, that he would, as soon as conveniently might be after the Marriage (subject and without prejudice to the raising, by any ways or means, and at any time or times he, the said *Arthur George Small*, should think proper, of any Sum or Sums of Money, not exceeding in the whole the Sum of 15,000*l.*, by *Mortgage, Annuity, or otherwise*, for his own use and benefit, and to any Deed or Deeds and Assurances which he might thereafter make and execute for securing the repayment of such Sum or Sums of Money and the Interest thereof) make and execute all such Deeds and Assurances as should be requisite for settling the Estates (subject to the Life-Interest of *Martha Lucas*), to the use of *Ashford*, his Heirs and Assigns for the life of *Matilda Webb Edwards*, in Trust for her separate use, with remainder to the use of *Small* during his life, with remainder to the use of the Children of the Marriage, as Tenants in Common in Fee, but in case they should all die under 21 and without having been married, and *Matilda Webb Edwards* should survive *Small*, to the use of her in Fee, but if *Small* should survive her, to the use of *Small* in Fee, and, if he should

1834.—Tasker v. Small.

afterwards die Intestate seized of the Estates, to the use of *Ashford* in Fee : and that, in the intended Settlement, there "should [*627] be contained Powers enabling *Ashford*, after the decease of *Small* and *Matilda Webb Edwards*, to apply the Rents of the Estates for the Maintenance and Education of the Children during their Minorities ; and, with the consent of *Small* and *Matilda Webb Edwards*, if living, and, after their deaths, at his own discretion, to raise not exceeding 1,000*l.* for the Preferment of each Child, and, to mortgage the Estates for a Term of Years for raising the same ; and (with the consent of *Small* and *Matilda Webb Edwards* or the Survivor) to sell the Timber on the Estates, and to invest the Money in Government or other Securities upon the like Trusts as were thereby declared ; and, during the life of *Matilda Webb Edwards*, to lease the Estates for 21 Years in Possession ; and also a like Power to *Small* when he should be in possession of the Estates : and that, in such Settlement so to be made as aforesaid, there should be likewise inserted and contained all such Powers, Provisoes, Covenants, Causes and Agreements as might, by Counsel, be considered essential for the Parties interested therein, or which might be proper for effecting the several Purposes therein mentioned, and as were usually contained in Settlements of the like kind, notwithstanding they were not thereby directed or noticed.

The Marriage took effect ; and *Small*, having borrowed 5,000*l.*, in part of the 15,000*l.*, from *Thomas Phillips*, by Indentures dated the 2d and 3d of March 1831, and by Fine, mortgaged the Estates, subject to the Life-Estate of *Martha Lucas*, to *Phillips* and his Heirs, for securing the repayment of the 5,000*l.* with Interest : and, some time afterwards, *Martha Lucas* joined with *Small* in suffering a recovery of the Estates, to the use of *Phillips* in Fee, subject to her Life Interest therein.

**Small*, having borrowed the further Sum of 5,000*l.* from *Joseph Wakeford*, [*628] by Indentures of the 26th and 27th of October 1832, in exercise of the Power reserved to him by the Articles, to raise for his own benefit not exceeding 15,000*l.* mortgaged the Estates, subject to *Martha Lucas's* Life-Interest and to *Phillips's* Mortgage, to *Wakeford* and his Heirs, for securing the re-payment of that 5,000*l.* with Interest.

By Indentures of the 28th and 29th of October 1832, made between *Small*, *Ashford*, *Phillips* and *Wakeford*, and *Benjamin Russell Baker* and *Thomas Mann*, after reciting that, upon the Treaty for the Loan of the last-mentioned 5,000*l.*, it was agreed that *Small* should make the Conveyance after-mentioned, the Estates were conveyed to *Baker* and *Mann* and their Heirs, subject to *Martha Lucas's* Life-Interest and to the Mortgages to *Phillips* and *Wakeford*, in Trust to sell, and, out of the Proceeds, to pay the Principal and Interest due to *Phillips* and *Wakeford*, and to pay the

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Surplus to *Small* or the other Person or Persons entitled thereto, for the time being, under the Articles.

Afterwards *Small*, in consideration of 1,000*l.*, sold an Annuity of 110*l.* to *Sarah Baker* for her life, and, for securing the payment thereof, by an Indenture (the date of which was not mentioned in the Bill) charged the Estates with the payment of the Annuity redeemable upon the Terms therein mentioned. *Small*, also, further charged the Estates with the payment of 2,500*l.* and Interest to *T. Hawkins*.

Default having been made in payment of the Principal and Interest secured by the Mortgages, *Baker* and *Mann*, on the 21st of December 1883, entered into and signed an Agreement, with the Plaintiff, to sell the Estates to him (subject to *Martha Lucas's* Life-Interest) for 19,250*l.* and *Small*, subsequently, ratified and confirmed the Contract.

The Bill, which was filed against *Small* and his Wife, *Ashford*, and the Incumbrancers on the Estates, after stating as above, alleged that the 19,250*l.*, far exceeded the amount at which *Small's* Reversionary Interest had been valued by two competent Valuers; that there was no Issue of the Marriage between *Small* and his Wife; that, since the execution of the Articles, the *Fee Simple and Inheritance of the Estates*, had been duly conveyed to and vested in *Phillips*, subject to *Martha Lucas's* Life-Interest; that the Plaintiff had been always ready to perform the Agreement, but *Small*, *Ashford*, *Baker* and *Mann* pretended that a good Title to the Estates free from Incumbrances except *Martha Lucas's* Life-Interest, could not be made. The Bill prayed that it might be declared that a good Title could be made to the Estates free from Incumbrances, except as aforesaid, and that the Contract might be specifically performed, and that *Small*, *Ashford*, *Baker* and *Mann*, might be decreed to do all necessary acts to convey the Estates to the Plaintiff accordingly, on payment of the 19,250*l.*

Ashford and Mrs. *Small*, demurred, generally, to the Bill.

Mr. *Treslove* and Mr. *Coote*, in support of the Demurrer:
[*630] The question turns on the construction which is to be put on the parenthetic words in the Articles: and it must be borne in mind that *Small's* Interest in the Estates, is Reversionary. *Small* covenants, with *Ashford*, to do all necessary acts for conveying the Estates to the uses upon the Trusts, &c. of the Articles, subject to the raising of any Sum or Sums not exceeding 15,000*l.*, by Mortgage, Annuity or otherwise, for his own use, and to the execution of any Deed or Deeds he might thereafter make for securing the repayment of such Sum or Sums and the Interest thereof. The Question is whether, under those words, he could, the day after the Articles were made, have sold the Estates for raising the 15,000*l.*,

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and could have called on his Wife and *Ashford* to join in the Sale. The Articles, after directing the Estates to be settled on *Small* and his Wife and their Children, provide for the insertion, in the Settlement, of Powers for the Maintenance and Advancement of the Children, and for the granting of Leases and cutting Timber on the Estates. *Small* mortgaged the Estates, first, to *Phillips*, and, next, to *Wakeford*; and, afterwards, he joined in conveying the Estates to *Baker* and *Mann*, in Trust to sell and pay off the Principal and Interest due on the Mortgages, and then to pay the surplus Proceeds of the Sale to *Small*, his Heirs, Executors &c., or the other Person or Persons, for the time being, entitled thereto under the Articles. Afterwards, he sold an Annuity to *Sarah Baker*, and charged it on the Estates: and, then, he made a third Mortgage to *Hawkins*, to secure 2,500*l*.

A Power of Sale does not arise on these Articles, either expressly or by implication. On the contrary, it appears from the whole tenor of the Articles, that the Parties intended that such a Power should not be inserted in the Settlement. If the Parties meant that *Small* should [*631] have a Power of Sale, it is strange that they should say: "By Mortgage, Annuity or otherwise." The general word, *otherwise*, is governed by the preceding particular words. Moreover, the Estates are to be settled subject to any Deed or Deeds that *Small* might execute for securing the repayment of the Sums to be raised and the Interest thereof.

[The Vice-Chancellor:—If the 15,000*l*. were raised by Annuity, how would you construct the Annuity-Deed?]

Small's Interest was reversionary, and it is not usual to give a Power to sell such an Interest. If it is sold, *Mrs. Small* will come into possession of an Income immediately.

[The Vice-Chancellor:—If the Sale was not to take place until after the death of the Tenant for Life, why were the words: "at any time or times," inserted in the Articles?]

If *Small* had any Power of Sale, it did not authorize him to sell the whole of the Estates, nor, indeed to sell any part of them after making the Mortgages, nor could he delegate the Power.

Lastly: No Person ought to be made a Party to a Suit for Specific Performance, except those who were Parties to the Contract. *Mrs. Small*, therefore, ought not to have been made a Party to this Suit. The Prayer of the Bill is improper as against Persons who are not Parties to the Contract.

*Sir *E. Sugden*, Mr. *Spence* and Mr. *K. Parker* appeared in [*632] support of the Bill.

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But The VICE-CHANCELLOR, without hearing them, said :

The only point on which I have any doubt, is whether Mrs. *Small* ought to have been made a Party to this Suit.*

It appears, on the face of the Articles, to have been the primary object of the Settlor to secure to himself the 15,000*l.*, and the Terms of the Deed are, I think, large enough to enable him to raise it by Sale.

The Deed recites that it was agreed, on the Treaty for the Marriage, that the Estates should, subject to the Estate for Life therein of *Martha Lucas*, and to the raising, *by Mortgage or otherwise*, of any Sum or Sums of Money not exceeding, in the whole, the Sum of 15,000*l.*, by and for the said *A. G. Small*, be conveyed to the uses thereafter expressed. Then, when we come to the witnessing part, we find these words: "Subject and without prejudice to the raising, by any ways or means, and at any time or times he, the said *A. G. Small*, should think proper, of any Sum or Sums of Money not exceeding, in the whole, the Sum of 15,000*l.*, by *Mortgage, Annuity or otherwise.*" The words "by Mortgage" do not imply a sale :

[*633] the word "Annuity" almost implies a Sale, as the raising of the Money by Annuity, is a more burdensome mode of raising it than a Mortgage is: then come the words, "or otherwise," which do imply a Sale. The words here used show an intention to increase the Power to raise the Money, as occasion should require.

I have no doubt upon the construction to be put on these words, and that they are sufficiently ample to enable Mr. *Small* to make a good Title to the Purchaser. The Demurrer, therefore, must be over-ruled.

1836: 3rd & 4th June.—*Specific Performance.—Parties.*

Though, in general, none but the Persons who sign the Contract ought to be Parties to a Bill for Specific Performance, yet a Purchaser may, under special circumstances, make other Persons who are interested in the Estate, Defendants to the Bill.

THE Cause now came on to be heard. It was admitted that the Facts of the Case, as they appeared on the Bill, were not altered.

Mr. *Knight*, Mr. *Spence* and Mr. *K. Parker*, appeared for the Plaintiff.

Mr. *Treslove* and Mr. *Coote* for the Defendants *Small* and *Ashford*.

Mr. *Jacob* and Mr. *Willcock*, for the Defendant Mrs. *Small*, urged the same Objections as had been raised on the argument of the Demurrer.

* The Counsel for the Demurrer said that they would waive the objection that Mrs. *Small* ought not to have been made a Party; their object being to obtain the Opinion of the Court on the principal Question. At the hearing of the Cause, however, (a Report of which is sub-joined,) Counsel appeared for Mrs. *Small* separately, and the objection was again raised and strongly urged.

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Mr. *Girdlestone*, Jun., for the Defendants *Phillips*, *Hawkins* and *Sarah Baker*, said though *Phillips* had, by his Answer, submitted, on being paid his Principal, Interest and Costs, to execute such Conveyance and do such Acts as might be necessary, on his part, to carry the Agreement into effect, yet he ought not, in the face of the question which had been raised between Co-defendants, "in the course of the Suit, to be [*634] ordered to convey the Estate, until it was settled who was entitled to it.

Mr. *Cooper* appeared for the Defendants, *Baker* and *Mann*.

The VICE CHANCELLOR :

This Case appears to be free from difficulty.

The Case is this.—*Small* being Tenant in Tail in remainder, and, being about to marry, entered into the Articles in question. The Opinion that I expressed in deciding on the Demurrer, remains unaltered, namely, that it was competent to *Small* to sell the whole Estate for the purpose of raising 15,000*l*.

The recital in the Articles is, &c. &c. So that the first object in dealing with the Estate, was that the 15,000*l*. should be raised for *Small*. And then it was witnessed, &c. &c.

It was said that the general power expressed in the first part of the Deed, is to be limited to a Mortgage, because there are the words: "Subject to any Deed or Deeds and Assurance which he might thereafter make and execute for securing the repayment of such Sum or Sums of Money and the Interest thereof." But inasmuch as it was expressly declared before, that the Settlement should be subject to his raising his 15,000*l*. by Mortgage, Annuity or otherwise, it would be too much to say that the Power is to be cut down, because there is a foolish reference to the Deeds by which the raising of the 15,000*l*. is to be effected. As the 15,000*l*. is, in the opinion of the two Valuers, a large proportion of the value [*635] of the Estate, it is reasonable to suppose that the Parties intended that Mr. *Small* should have a power of raising that Sum by Sale, as there would be a greater facility of raising the Money by Sale, than by Mortgage: for, when Money is raised by Mortgage, the Person who lends the Money, always requires the Estate to be of considerably greater value than the Mortgage-money. *Prima facie* it does not appear likely that any one would lend 15,000*l*. on Mortgage of the Estate, the day after the Articles were executed. Therefore it would be idle to say that Mr. *Small* should have the power of raising the 15,000*l*., at any time, unless he had power to raise it by Sale. Then what is done? First he executes a Mortgage and levies a Fine to *Phillips*, for securing 5,000*l*., and then he mortgages the Equity of Redemption to *Wakeford*, for securing a further Sum

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of 5,000*l.* Then there are two other Transactions, by one of which 2,500*l.* was raised by Mortgage, and by the other 1,000*l.* was raised by Annuity ; so that 13,500*l.* has been raised in the whole. If that were all, I should think it a matter of course that *Small*, having the power, might, with the concurrence of the Parties having the prior charges, sell the Equity of Redemption to raise the Sum mentioned in the Articles.

Mr. *Jacob* said that it was the duty of *Small* to keep down the Interest on the Sums which he has borrowed. A Tenant for Life is bound to keep down the Interest of an Incumbrance on the Estate, but that does not apply to the Case of a Tenant in Tail in remainder. He is not bound to do so, because there is no Fund to keep it down. As *Small* was empowered to raise the 15,000*l.*, the Interest would be chargeable on the [*636] Estate, as the object was that he should have the whole 15,000*l.* to put in his pocket.

Then he ultimately executes certain Instruments by which he conveys the Equity of Redemption to *Baker* and *Mann*. That was a useless piece of machinery : but it was quite competent to him to employ them as his Agents in selling the Estate ; and, as he ratified the Contract, it was his Contract.

Tasker, having got the Contract, has a right to have it performed : and the legal Estate being in *Phillips*, he is not willing to convey it, point blank, to *Tasker*, but desires that if he does, he shall have competent authority for so doing. Then the Bill is filed ; and, as the question is raised whether the legal Estate can be so conveyed, Mrs. *Small* is, of necessity, made a party to the Suit. Therefore, on account of the hesitation of *Phillips* to reconvey the Estate, the Suit is rightly constructed by making Mrs. *Small* a party.

There must be a Declaration that it is competent to *Small* to sell the Fee Simple of the whole of the Estate to raise the 15,000*l.*, and it must be referred to the *Master* to inquire whether the whole or what part of the 15,000*l.* has been raised, and whether, at the time of the Contract, the Sum proposed to be given was a fit and proper Sum to be given.

 [*637]

 *POWYS v. MANSFIELD.

1836: 25th May and 1st June.—*Practice.*—*Demurrer of Parol.*—*Infant.*—*Decree.*

As the Demurrer of the Parol has been abolished by 11 Geo. 4, & 1 W. c. 47, an Infant Defendant is not entitled to have Six Months given to him, after attaining 21, to show Cause against a Decree.

THE Judgment on the hearing of this Cause, was delivered on the 23d of February 1836 * ; but the Minutes of the Decree were not finally arranged

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until the 27th of April. The Decree was dated on the last-mentioned day, and concluded in the following words: "And this Decree is to be binding on the said Defendant, *John Simeon*, the Infant, unless he, being served with a Subpœna to show Cause against the same, *shall, within six months after he shall attain his age of 21 years*, show unto this Court good Cause to the contrary."

On the 8th of February 1836, the Defendant, *John Simeon*, who was the eldest Son of the Defendants, Sir *Richard* and Lady *Simeon*, attained 21: that fact, however, was not disclosed until the Notice of the present Motion was served.

A Motion was now made on behalf of the Defendant, *John Simeon*, That he, having attained his age of 21 Years, might be at liberty to put in a new and further Answer to the Plaintiff's Bill in this Cause, and that he might have Six Week's time given him for that purpose, and that, in case the Plaintiff should reply thereto, the Defendant, *John Simeon*, might be at liberty to examine Witnesses in support thereof, and that this Cause, on such Answer, with any Evidence which might be gone into in verification of support thereof, might be again set down and come on to be heard, and that, in the mean time all Proceedings under the Decree made on the hearing of the Cause, might be stayed.

*Sir *C. Wetherell* and Mr. *Bethell*, in support of the Motion, [*638] relied, principally, on *Kelsall v. Kelsall* (a). They also cited *Bennet v. Lee* (b), *Fountain v. Coine* (c), and *Napier v. Lady Effingham* (d); and said that Sir *Richard Simeon* was ready to pay, into Court, the Money directed to be raised by the Decree.

Mr. *Knight*, Mr. *Jacob* and Mr. *Chandless* for the Plaintiff, and the Defendant, his Infant Son:

In *Kelsall v. Kelsall*, the Defendant on whose behalf the Application was made, was an Heir-at-Law. But Mr. *Simeon* is not the Heir of either Sir *John* or Sir *Fitzwilliam Barrington*. It is not of course, after Decree, to allow a Defendant, on coming of age, to make a new Case. Nor, indeed, is it the Practice of the Court, except where a Decree is made against an Infant personally, (as in a Suit to foreclose a Mortgage, or to establish a Will,) to give the Infant Six Months after coming of age, to show Cause against the Decree. The reasoning of Lord *Hardwicke*, in *Bennet v. Lee*, shows that the indulgence will not be granted unless a special Cause is made. The general rule is that an Infant Defendant, on coming of age, can only

(a) 2 Myl. & Keen, 409.

(b) 2 Atk. 487. 529.

(c) 1 P. W. 504.

(d) 2 P. W. 401.

* See ante, p. 528.

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show Error in the Decree. *Williamson v. Gordon* (e). The Report of *Fountain v. Caine* is not very intelligible: for an Infant is never bound by the Answer of his Guardian.

In this Case, Evidence was given on behalf of the Infant. Has an Infant, on coming of Age, ever been allowed to make a new Case, where he has, himself, entered into Evidence? It would be pregnant with [*639] mischief to Property, if a Plaintiff could not obtain *relief against an Infant, except at the risk of having a new Case made, after all his evidence has been exposed. If an Infant's Case has been misconducted, he has remedy against the Solicitor who acted for him.

The Rule that an Infant, on coming of Age, may put in a new Answer, is stated, by Lord *Hardwicke*, in *Bennet v. Lee*, to be founded on the Practice of Courts of Law which allows the Parol to demur. By the 11 G. 4, & 1 W. 4, c. 47, s. 10, (which received the Royal Assent Three Years before the Bill in this Cause was filed) the Demurrer of the Parol is abolished. As the principle of the Rule has been abolished, the Rule itself no longer exists.

Besides, the Defendant, Mr. *Simeon*, came of Age on the 8th of February. Your Honor's Judgment was delivered on the 23d of that Month, and the Decree was drawn up on the 27th of April. So that the Defendant was adult long before the Decree was made. There is no Case in which a Defendant, who was an Infant at the institution of the Suit, has been allowed to make a new Defence, where the Decree was made after the Infant came of Age.

The VICE-CHANCELLOR :

In this Case the Decree ought to be considered as having been made on the 27th of April, for it was not until then that the Terms of it were finally settled. So that the Decree was made after the Defendant had attained 21.

In all the Cases that have been cited, and, also, in a Case in [*640] *Mosely* (f), the Defendant was an Infant when *the Decree was pronounced; and that fact is referred to by the Judges who decided those Cases.

Here, however, the Defendant on whose behalf the Application is made, was adult when the Decree was pronounced: and, moreover, that Decree was absolute. I say *absolute*, for the giving to the Defendant, who had attained 21, Six Months, "*after he shall attain 21,*" to show cause against the Decree, was giving him an impossible day. No one ever supposed that the Application could be made, after an absolute Decree had been pronounced.

I wish, however, this Motion to stand over, in order that it may be as-

(e) 19 Ves. 114.

(f) Anon. Mos. 66.

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certained whether there is any instance of the Application being granted, where the Defendant was adult when the Decree was pronounced.

Sir Charles Wetherell having said that he had not been able to find any further Authority, The *Vice-Chancellor* delivered Judgment as follows:

The Case remains in the position in which it was left a Week ago. I have thought of it, a good deal, since; and have also taken the opportunity of mentioning the general point, which arises upon the 11 G. 4, & 1 W. 4, c. 47, both to The *Lord Chancellor* and The *Master of the Rolls*, and they agree with me in thinking that the plain meaning of that Statute was that the Parol should not demur, and, as a necessary consequence, that the Six Months should not be given in a Decree, by reason of a Defendant being an Infant; because the giving of the Six Months, was founded on the circumstance that, in certain cases the Parol has demurred: and it was properly *observed, by Mr. *Jacob*, in the course of the [*641] Argument, that it is not a general proposition that, in every case in which an Infant is a Defendant, the Six Months were given by the old Practice; but the Six Months were given by Decrees in this Court which would have, in their operation, an effect similar to that which would take place in cases at Law, where the Parol would demur.

By the express language of the 10th Section of the Act, it is declared that: "Where any Action, Suit or other proceeding for the payment of Debts, or any other purposes, shall be commenced or prosecuted by or against any Infant under the Age of 21 Years, either alone or together with any other person or persons, the Parol shall not Demur; but such Action, Suit or other proceeding shall be prosecuted and carried on, in the same manner and as effectually as any Action or Suit could, before the passing of this Act, be carried on or prosecuted by or against any Infant, where, according to Law, the Parol did not Demur." And then the 11th Section directs: "That, where any Suit hath been or shall be instituted in any Court of Equity for the payment of any Debts of any person or persons deceased, to which their Heir or Heirs, Devisee or Devisees, may be subject or liable, and such Court of Equity shall Decree the Estates liable to such Debts, or any of them, to be sold for satisfaction of such Debt or Debts, and, by reason of the infancy of any such Heir or Heirs, Devisee or Devisees, an immediate Conveyance thereof cannot, as the Law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such Infant or Infants to convey such Estates so to be sold (by *all proper Assurances in the Law) to the Purchaser or Pur- [*642] chasers thereof, and in such manner as the said Court shall think proper and direct; and every such Infant shall make such Conveyance accordingly; and every such Conveyance shall be as valid and effectual, to

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all intents and purposes, as if such person or persons, being an Infant or Infants, was or were, at the time of executing the same, of the full Age of 21 Years." It is clear, therefore, upon these Sections, that the meaning of the Statute was that, where there is a Decree which affects the Real Estate of an Infant, if the Court thinks right to make a Decree, the Court is to follow up that Decree by ordering Conveyances to be made, which the Statute directs to be as valid as if the Infant was of the Age of 21 Years. There is no doubt, in my Opinion, that the saving of the Six Months is virtually abolished; and in that Opinion, as I said before, *The Lord Chancellor* and *The Master of the Rolls* agree.

Then how does this Case stand?—The Decree was pronounced after the Infant had attained the Age of 21 Years; and I before adverted to the peculiar language contained in this Decree, which is so constructed that though, apparently, it gave the Six Months to the Infant, yet, in fact, it has not done so.

In none of the Cases which have been cited, was the application, by the Infant, to make a new Defence, made after the Decree had been made absolute; but, in all those Cases, either the application was made during the Infancy of the Defendant, or after he had attained 21, but before the Decree had been made absolute. Now, in this Case, both those circumstances are wanting: for the Application is made by the Defendant after [*643] 'he has attained 21, and after the Decree is absolute, (because the saving that is contained in this Decree, goes for nothing :) and, moreover, the Decree was pronounced after the Defendant had attained 21.

It seems to me, therefore, that neither the Precedents which have been quoted, nor the state of the Law as it ought to be taken to be after the passing of the Act to which I have alluded, justify the Application; and, therefore, it must be refused; and, as it is an experimental Application, it must be refused with Costs.

 GASKELL v. GASKELL.

1836: 18th and 19 March—*Partition*.—*Tenant for Life*.

A Tenant for Life of an undivided Share of an Estate, with Remainders to his unborn Sons in Tail, may file a Bill for a Partition; and the Decree will be binding on the Sons when in case.

UNDER the Will of *James Milnes*, the Plaintiff was Tenant for Life, with remainders to his first and other Sons, successively, in Tail, of an undivided

1836—Gaskell v. Gaskell.

Moiety of certain Estates; and the Defendant, *Benjamin Gaskell*, was Tenant for Life, with remainders to his first and other Sons successively in Tail, of the other undivided Moiety of the same Estates. The Plaintiff had no Issue. *Benjamin Gaskell* had Issue one Son, the Defendant, *James Milnes Gaskell*, who was Adult. The Plaintiff and the Defendants having entered into an Agreement to make Partition of the Estates, the Bill prayed that a Partition might be made according to the Agreement, or in such other manner as to the Court should seem meet, and that the entirety of such of the Estates as should be allotted to the Plaintiff, might be conveyed to the same uses as the undivided Moiety limited, by the Will, to the use of the Plaintiff and his Sons, was then subject to, and that the entirety of the *Residue of the Estates might be conveyed [*644] to the same uses as the other undivided Moiety was then subject to; and, if necessary, that a Commission of Partition might Issue for carrying the Agreement into execution; and that all necessary Parties might be ordered to join in executing proper Conveyances, and doing all acts necessary for the purposes aforesaid.

The Cause having come on to be heard,

Mr. *Wigram* and Mr. *Grubb*, for the Plaintiff, said that doubts had been entertained whether, in a Suit for a Partition instituted by a person who was Tenant for Life only, a Decree could be made which would be binding on the persons in Remainder.

Mr. *Duckworth* for the Defendants.

The *Vice-Chancellor* said he would consider the point.

On this day (19th March) His Honor said that, in *Martyn v. Perryman* (a) the Court decreed a Partition, notwithstanding *Femes Covertes*, Infants and Incumbrancers, were concerned: that, in *Lord Brook v. Lord Hertford* (b) the Court seemed to think that there might be some difficulty where one Party was Tenant for Life; but the Court had frequently decreed a Partition, where the Tenant for Life was a Defendant; that the manner in which the Parties were arranged could make no difference, and, therefore, that, in this Case, the Partition might very well be carried into effect, notwithstanding the Plaintiff was Tenant for Life only; but it must be referred to The *Master* to inquire and state whether it *would be for the benefit of the future Issue of the Plaintiff, [*645] that the Agreement, either without variations or with any and what variations, should be carried into effect.

(a) Rep. Ch 125.

(b) 2 P. W. 518.

1836.—Ex Parte Payne.

EX PARTE PAYNE.

1836: 23d April.—*Trustee.*—*Construction of 11 Geo. 4. and 1 W. 4, c. 60.*

The Devisee of a Mortgage is not a Trustee for the Executors of the Testator, within 11 Geo. 4, & 1 W. 4, c. 60.

ANN HUNTINGDON, being seised of several Mortgages in Fee. by her Will gave One-Half of all her Property to her Grand-Niece, *Ann Huntingdon Ascroft*, and the other Half, to her Nephews, Nieces and Brother, and appointed *J. M. Payne* and *S. Johnson* her Executors. The Testatrix left *Ann Huntingdon Ascroft*, and one Brother and nine Nephews and Nieces, one of whom was *Maria* the Wife of *John Ascroft*, her surviving.

In pursuance of an Arrangement made between the Executors and the Parties entitled to the Equity of Redemption of the *mortgaged Premises*, and, as it was alleged, with the concurrence of the Devisees, Executors caused Deeds of Lease and Release to be prepared, whereby the mortgaged Premises were expressed to be conveyed, by the Devisees, to *W. Bird in fee*, in Trust for the Executors and to be conveyed as they should direct on payment of the Principal and Interest due thereon respectively. Mr. and Mrs. *Ascroft* having refused to execute the Deeds, the Executors presented a petition, under 11 Geo. 4, and 1 W. 4, chap. 60, praying that some person might be appointed to convey the Premises, to *Bird*, in the place of Mr. and Mrs. *Ascroft*.

Mr. *Knight* and Mr. *K. Parker*, for the Petitioners, said [*646] that the Petition was presented under the 8th Section of the Act, in consequence of Mr. and Mrs. *Ascroft* having refused to execute the Conveyance.

Mr. *Jacob*, for Mr. and Mrs. *Ascroft*:

The 8th Section applies to Trustees, and to Cases where the Party has, for 28 days, refused to execute a *proper Deed*. Mortgages as well as Trusts are mentioned in the 6th and 7th Sections; but Trusts only are mentioned in the 8th Section: therefore, the Section was not intended to apply to Mortgages. *In Re Goddard (a)*; *In Re Stanley (b)*

The Conveyance to *Bird* was not a *proper Deed*; for it was not such a Deed as Mr. and Mrs. *Ascroft* could be required to execute. The Executors ought to have received the Money due on the Mortgages, and then my Clients would have been bound to re-convey the Estates to the Mortgagors; but they are not bound to transfer the Estates to a Trustee appointed by the Executors. Besides Mrs. *Ascroft* has a beneficial Interest in a Portion of the Property.

(a) 1 Myl. and Keen, 25.

(b) *Ante*, Vol. V. p. 320.

1836.—Ex Parte Payne.

Mr. *Knight*, in reply :

It has been repeatedly decided that the Heir or Devisee of a Mortgagee, is a Trustee for the Persons entitled to the Mortgagee's Personal Estate. The Cases cited do not apply ; for, in those Cases the question did not turn on the character of the Heir, but of the Intestate ; it was the Heir of the Mortgagee who could not be found : and a Conveyance cannot be obtained where an Heir cannot be found, unless he be the *Heir [*647] of a Trustee. If Mrs. *Huntingdon* had died Intestate, and her Heir could not be found, then this Case would have been similar to the Cases referred to : but she has devised the Legal Estate to Persons who have become Trustees for the Parties entitled to her Personal Estate.

By the 18th Section Constructive Trusts are positively declared to be within the Act.

[The *Vice-Chancellor* :—Is the Heir of a Mortgagee more a Trustee for the Executor, than he is for the Mortgagor, where the Mortgage-money has been paid off ?]

If the Mortgage-money had been paid off in the lifetime of the Mortgagee, the Heir would have been a Trustee for the Mortgagor.

The VICE-CHANCELLOR :

The Question in this Case, is whether Mrs. *Ascroft* is a Trustee for the Executors of the Testatrix, within the meaning of the 8th Section of the Act.

In the 6th and 7th, and in some of the other Sections, the words *Trust* and *Mortgage* are both used ; but, the word *Mortgage* is not found in the 8th Section. It is clear, therefore, on the face of the Act, that the Legislature meant to make a marked distinction between a Trustee and a Mortgagee.

By the 18th Section it is declared that the Provisions of the Act shall extend to Cases of Constructive Trust ; but I apprehend that that Section was not meant to extend the Provisions of the Act to any Case of Trust to which the 8th Section was intended not to apply ; *and as the 8th Section was intended not to apply to the Case of [*648] a Mortgagee, the 18th Section does not make it have that application.

Mr. *Jemmett*, in his Second Edition of Sir *Edward Sugden's Acts* (c) makes this observation on The Reporter's Note to the Case, *In re Goddard* : " The Reporter, in a Note to the above Decision, adds, ' the Case in question seems to be *casus omissus* in the Act.' But this is not so : the Case of a Mortgagee was intentionally distinguished, in this respect, from that of

(c) See page 151.

1836.—*Ex Parte Payne*.

a mere Trustee, by the framer of the Act, and was purposely omitted from the operation of this Section, through fear of the mischiefs that might occur by too hastily disposing of the Interest of Mortgagees, under the idea of their being merely Trustees." If any Case were wanting to illustrate the object which Sir *E. Sugden* had in view when he framed the 8th Section of the Act, this Case would have illustrated it. It is plain that the Parties refusing to execute the Conveyance, have a beneficial Interest, as well as a Trust in one sense of the word.

My Opinion is that this is not a Case within the 8th Section of the Act.

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TO THE

PRINCIPAL MATTERS.

ACCOUNT.

1. By articles of partnership, it was agreed that just and true accounts should be made out, half-yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and, after the death of two of the other partners, it was discovered that the accounts were fraudulent. Held that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles.—*Oldaker v. Lavender*. 239

2. A. conveyed his estates to B., in trust to sell and pay off a mortgage and other incumbrances on the estates, and to retain a debt due to B., and until the sale, to apply the rents in keeping down the interest on the charges, and to pay the surplus to A. B. took a transfer of the mortgage, and entered into and remained in possession for 24 years, but did not sell the estates. For the first 10 years the rents were less than the interest; but, afterwards, they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, and for a reconveyance of the estates. But the court refused to direct the rests. *Latter v. Dashwood*. 462

See ACQUIESCENCE.—MULTIFARIOUSNESS.—PLEA AND PLEADING, 8.—REPORT.—VOLUNTARY DEED.

ACCUMULATION.

See ALIENATION.

ACQUIESCENCE.

If a person interested under a will, files a bill for an account, against the executors,

not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of, were known to the deceased plaintiff. *Garrett v. Noble*. 504

ADEMPTION.

1. Testator gave, to his wife, his house in B., and the furniture in the said house.—The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it. Held that the legacy was adeemed. *Colleton v. Garth*. 19
2. Testator bequeathed 7,000*l.* secured on mortgage of an estate at W., belonging to R. T. The 7,000*l.* and interest were received, after the date of the will, by the testator's agent on his account, and, immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. Held that the legacy was specific, and, notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. *Gardner v. Hatton*. 93

ADMINISTRATION.

See COVENANT, 2.—EXECUTOR.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. The proprietors of Convent Garden Thea-

tre agreed, with an actor, that he should act for 24 nights during a certain period of time at their theatre, and that, in the meantime, he should not act at any other place in London. Held that the court cannot enforce the positive part of the contract, and therefore it will not restrain, by injunction, a breach of the negative part. *Kemble v. Kean.* 333

2. Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberley v. Jennings.* 340

3. The court will not give any assistance to a party seeking to enforce a hard bargain. *Ibid.*

See PARTIES.

ALIENATION.

Testator devised his estates to trustees, in trust to pay, out of the rents, 300*l.* a year for the maintenance of his son's children, and to pay the surplus rents to his son during his life, for the maintenance of himself and his family; but so as he should not have any power to charge or alienate the same: provided that if his son should in any manner, impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees, for the benefit of the son's children. The son conveyed his interest under the will to trustees for his creditors. Held that, thereupon, the trust for accumulation, took effect. *Lewes v. Lewes.* 304

AMENDMENT.

A bill was filed against two trustees, alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees in their answer admitted that they had both acted in the trusts. The plaintiffs, however, did not amend their bill. Held that they were nevertheless entitled to charge both the trustees with the loss occasioned by the breach of trust. *Taylor v. Tabrum.* 281

ANNUAL RESTS.

See ACCOUNT, 2.

ANNUITY.

Testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained 21, and another annuity, payable in like manner, to his daughter, (who was adult) during the son's minority. Held that, as the son

was entitled to a proportional part of his annuity, from the last half-yearly day of payment up to his attaining 21, the daughter was entitled to a like proportional part of her annuity. *Weigall v. Bromes.* 99
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APPORTIONMENT.

See ANNUITY.—CONSTRUCTION, 9.

ASSETS.

See CONSTRUCTION, 2.—COVENANT, 2.—EXECUTOR, 4.

ASSIGNMENT.

See VOLUNTARY DEED.

ATTACHMENT.

1. A defendant who had been taken on an attachment for want of appearance, was discharged, under 11 Geo. 4 and 1 Will. 4, c. 36, before plaintiff got an appearance entered for her. Held that, though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. *Williams v. Townsend.* 296
2. The defendant's time for answering having expired, the plaintiff's clerk in court gave notice, on a Saturday, that he must attach the defendant at the next private seal, which was on Monday following: and, on that day, the plaintiff sealed an attachment. On the same day, the defendant, not knowing that the attachment had been sealed, applied for an order for time, and gave notice, to the plaintiff's clerk in court, that he had done so. The attachment was discharged without costs, as the defendant had used due diligence in obtaining the order for time. *Taylor v. Fisher.* 566

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BALANCE OF ACCOUNT.

See DEBTOR AND CREDITOR, 4.

BANK OF ENGLAND.

To a bill for a discovery of stock standing in

the name of the plaintiff's late father, either alone or jointly, for 20 years before and at his death, and for an inspection of the Bank books containing the entries of such stock, the Bank, in their answer, set forth an account of the stock, but declined to set forth a list of the books containing the entries. Held that they were not exempted from the production of their books, and, therefore, ought to set forth a list of them. *Heslop v. The Bank of England*.

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BANKRUPT.

1. C. brought an action against F., in the Lord Mayor's Court, for the recovery of a debt, and issued an attachment against B., who had in his hands funds belonging to F. W. filed a bill against C., B. and F., claiming a lien on the funds, and obtained an injunction, *ex parte*, to restrain proceedings in the action. Whilst the injunction was in force, F. became bankrupt. Held that though C. might, but for the injunction, have sued out execution long before F. became bankrupt, yet he was not entitled to be paid otherwise than rateably with the other creditors.

Ullock v. Barber.

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2. A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on behalf of the owner, a certain sum, for freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other, on the completion of the voyage. The owner being indebted to C., ordered, in writing, A. to pay to C. all monies he might receive under the charter-party; and, accordingly, A. paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt. Held that the remainder of the freight was not in his order and disposition at his bankruptcy. *Gardner v. Lachlan*.

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3. A. assigned 800*l.* to trustees in trust, during the life of B. or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition or engagements: and it was declared that, after his death, the 800*l.*, and all savings and accumula-

tions of interest, if any, should be in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy. Held that the life interest passed to his assignees. *Snowdon v. Dales*.

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See CHARGE ON BENEFICE.

BIDDINGS.

See OPENING BIDDINGS.

BILL OF DISCOVERY.

1. A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief. *Angell v. Westcombe*.
2. A bill of discovery is demurrable, if the words "stand to and abide such order and decree therein" are inserted in the prayer of process. *James v. Herriott*.

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See CROSS BILL.

BILL OF REVIVOR.

See ACQUIESCENCE.

BREACH OF CONTRACT.

See AGREEMENT.

BREACH OF TRUST.

See PLAINTIFF.—TRUSTEE AND CESTUI QUE TRUST.

CAUSE AND CROSS CAUSE.

A. filed a bill against B., which B. answered, and then filed a cross-bill against A. A., not having answered the cross-bill, B. issued an attachment against him, but was unable to serve it, as A. was resident abroad. A. proceeded to examine witnesses in his cause. The court, on the application of B., ordered publication not to pass in A.'s suit, until he should have put in his answer and cleared his contempt in B.'s suit, and the court should order publication to pass. *Palmer v. Leicester*.

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CERTIFICATE.

See EXCEPTIONS, 2.

CHARGE ON BENEFICE.

A vicar, whilst the 13th Eliz. c. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living, and, that in the meantime, it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13th Eliz. Held that the cove-

nant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. *Metcalf v. The Archbishop of York.* 224

CHARITY.

A testator devised his real estate, to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R. and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information was filed on behalf of two other parishes, claiming to participate in the charity, and a decree was made in 1680, directing that the rents should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish, for a similar purpose; and that parish was decreed to be entitled to a share of the rents, in the proportion of its extent and population to the extent and population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final. *The Attorney General v. The Mayor of Rochester.* 273

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CLERGYMAN.

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COMMISSION TO EXAMINE WITNESSES.

Commission to examine witnesses at Madras, directed to the judges of the supreme court there. *Murray v. Lanfurd.* 573
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CONFIRMATION OF REPORT.

See PRACTICE, 3.

CONSENT OF CREDITORS.

See PLEA AND PLEADING, 2.

CONSENT TO MARRIAGE.

Testator directed his trustees to pay, to his

daughters, their portions, on their marrying with the consent, in writing, of his trustees first had and obtained; and, on their marrying without such consent, that the trustees should stand possessed of their fortunes, in trust for their separate use for life, with remainder to their children, A. proposed to the trustees to marry one of the daughters, who was an infant.—The terms, as communicated to her by one of the trustees, were that 500*l.* should be paid to A. on his marriage, out of her portion, and that the remainder should be invested, in the names of trustees, for her sole use and benefit, the interest to be paid to her only. The daughter accepted the proposals, and asked the consent of the trustees. The same trustee then wrote a letter to the daughter, saying that he and his co-trustee had not then signed the consent, but were ready to do so as soon as requisite: and a draft was prepared by which (subject to the payment of the 500*l.* to the husband) the portion was settled on the intended husband during his solvency, then on the intended wife for her separate use for life, with remainder to the children, with remainder to the survivor of the intended husband and wife.—A., having made certain arrangements for the disposal of the 500*l.*, which the trustees disapproved of, the trustee who had written the letter, refused to look at the draft of the settlement, saying he should expect A. to make some other proposals respecting the disposal of the 500*l.*—Another arrangement was, accordingly, made and communicated to the trustee, but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented) was had without further communication with him. Held that the letter was a sufficient consent on his part to the marriage. *Le Jeune v. Budd.* 441

CONSTRUCTION.

1. A testator domiciled in Jamaica, became, during a temporary residence at Frankfurt, engaged and betrothed to a lady; and, by a codicil to his will, after mentioning her by name and alluding to his intended marriage with her, he gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died. Held that the lady was entitled to the legacy. *Schloss v. Stöbel.* 1
2. A rent-charge expressed to be for a jointure, and in lieu of dower and thirds at common law, does not bar the jointress of her distributive share in her husband's undisposed of personal estate. *Colleton v. Garth.* 19
3. The word "representatives" in a will, construed to mean "descendants," the context requiring it. *Slyth v. Monroe.* 49

4. Testator bequeathed the remainder of his property to his sister A. B., to dispose of amongst her children as she might think proper. Held that A. B. took no interest in the residue. *Blakeney v. Blakeney*. 52
5. Testatrix devised all her messuages situate in Denmark-court. She had five houses situate in the court, and another which fronted towards the Strand and formed one side of a covered passage leading to the place where the five were situate, and which had attached to the back of it an outbuilding abutting on ground in Denmark-court. Held that the five houses only passed. *Newton v. Lucas*. 54
6. A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide, equally, any monies which might remain to his account after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money accounts subsisting between him and his bankers and other persons. Held that the bequest did not pass his residuary estate but only the balances due on those accounts, subject to the debts and legacies. *Hastings v. Hane*. 67
7. By a Scotch settlement a sum of stock was settled on the husband and wife for their lives, and, after the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife: and she was empowered, at any time in her life, and even on death bed, to bequeath or dispose of the stock to any person, and in any manner she might think proper. Held that the power was not intended to be available, except in the event of there being a failure of children of the marriage. *Peddie v. Peddie*. 78
8. A testator seized of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever." Held that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall v. Brome*. 99
9. Testator gave to his son, in case he should live to attain 21, such part of his real estate as his son should choose, but not exceeding the yearly value of 350*l.*, and to his daughter, such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate, as in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.* Held that the son was entitled to priority of choice on attaining 21, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* *Ibid*. 99
10. A testator, after several devises and bequests, gave, devised and bequeathed all his messuages, chattels real, ready money, securities for money, debts and personal estate to A. and B., their heirs, executors, administrators and assigns, upon certain trusts. Held that the legal estate in premises mortgaged to the testator in fee, passed to A. and B., the trusts declared not being repugnant to that construction. *Mather v. Thomas*. 115
11. Testator directed the interest of 10,000*l.* to be for the separate use of his daughter Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband.—The husband died, and his widow married again. Held that the trust for the separate use, ceased on the death of the first husband. *Benson v. Benson*. 126
12. Testator gave 450*l.* to trustees, their executors, &c., in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son.—And he gave the residue of his personal estate, to his son, his executors &c. Held that the words legal representatives, meant next of kin. *Walter v. Makin*. 148
13. Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted in the settlement so to be made powers of leasing, sale, partition, and exchange.—"And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature." Held that a power to appoint new trustees, was a proper and reasonable power to be inserted in the settlement.—*Lindon v. Fleetwood*. 152
14. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of 14, or to be reserved till they attained 21 to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under 21. Held that James and Henry were entitled to the residue. *Prestwidge v. Groombridge*. 171
15. Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested. Held that only the legacies in the will were payable out of the real estate. *Strong v. Ingram*. 197
16. Testator, after directing all his debts to be fully paid, devised his real estates to several different persons, and charged certain of them with specific sums. Held

- that those estates, as well as the others, were charged with the debts. *Taylor v. Taylor.* 246
17. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, and, on her decease, "I give the said 6,000*l.* to the children, or their descendants, of T. F., in such proportions to each as my daughter may direct." The daughter died without having made any appointment.—Held that the children of T. F. were entitled to the fund, to the exclusion of their issue. *Jones v. Turin.* 255
18. Testatrix gave a weekly sum to A. for his life, or until he should attempt to assign, &c. the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should, by will duly executed, give and bequeath the same. A. died, having made an invalid appointment of the stock. Held that there was an implied gift to his wife and children in default of appointment.—*Brown v. Pocock.* 257
19. Testator gave a sum of stock to his wife, for life, and, after her death, to his sons and daughter: and he directed the interest of his daughter's share, to be paid to her, for her separate use, for life, and, at her decease, the capital to be divided amongst such children as she should have living at his decease, the shares of sons to be paid at 21, and of daughters at 21 or marriage, provided their mother was then dead, otherwise her children's shares were not to be paid to them until her decease; but, if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living; and, if any of his said sons and daughter should die before his wife, and without leaving issue, their shares to be divided among his other children. Held that the daughter's children living at the testator's death took absolute vested interests at 21, though their mother was still living; and that her interest in the share of one of the testator's sons who died in the lifetime of his widow was not subject to the same trusts as her original share, but vested in her absolutely. *Gibbons v. Langdon.* 260
20. By a marriage settlement, estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and if more children than one, equally to be divided among them as tenants in common: and, for default of such issue, to the wife and her heirs. Held that the husband did not take an estate in tail special, but for life only, and that the children took by purchase as tenants in common in fee in remainder. *North v. Martin.* 260
21. Testator devised an estate to trustees, in trust for R. T. for life, and, after the death of R. T., in trust to convey the estate unto, between or amongst all and every, and such one or more of the child or children of R. T. who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take, between or amongst them, the share which their parent or parents would have been entitled to if then living. R. T. survived the testator, and died leaving several children and the issue of another child who was dead at the date of the will. Held that such issue were entitled to take, amongst them, an equal share of the estate with the surviving children. *Tytherleigh v. Harbin.* 329
22. Testator devised an estate to A. for life, remainder to trustees to preserve, &c. remainder to all the children of A. as tenants in common and not as joint tenants, and, for want of such issue, to B. for life, remainder to trustees to preserve, &c. remainder to all the children of B. as tenants in common and not as joint tenants, and, for want of such issue, to C. in fee. Held that the children of A. took estates for life, with cross-remainders between them, for life, with remainder to B. for life, with remainder to her children as tenants in common, with cross-remainders between them for life, with remainder to C. in fee. *Ashley v. Ashley.* 358
23. Testator, by his will, gave an annuity to his daughter out of certain estates for her separate use. By a codicil, he gave her a life estate for her separate use in the same estates. Held that the daughter was entitled to the life estate only.—*Graves v. Hicks.* 391
24. Testator charged his estates with an annuity in favour of his wife, and, subject thereto, he devised the estates in strict settlement. Afterwards by his will and codicils, he charged the estates with several annuities to his wife and other persons. Held that the first-mentioned annuity was the primary charge on the estates. *Ibid.* 391
25. Testator devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to his daughter, and, after her death, with the payment of an annuity to her husband. He then made a codicil which, in effect, revoked the husband's life estate in remainder.—By a subsequent codicil, he gave, to the husband, a life estate in possession in the first estate, and also an annuity in possession, to the same amount, and charged upon the same estates as the former annu-

ity. Held that the second annuity was substituted for the first. *Ibid.* 391

26. Testator gave the interest of a fund to his wife for life, and, after her death, to such of his four daughters as should be then living, in equal shares during their respective lives; and, from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child.—Held that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. *Woodstock v. Shillito.* 416

27. Testator bequeathed 5,000*l.* to A., if he attained 21, but if he should not attain that age or die without leaving issue male, then over. Held that the 5,000*l.* vested, absolutely, in A. on his attaining 21.—*Mytton v. Boodle.* 457

28. Where a decree in a cause in which previous references have been made, directs a reference to the Master in rotation, the decree will be carried to the Master to whom the previous references were made. *Attorney-General v. Shore.* 460

29. Testator gave annuities to his widow and son and directed the surplus of his personal estate and the rents of his real estate to be invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time and times should arrive when distribution should be made, as thereby directed. The testator then directed his real estates to be sold after the decease of the survivor of his wife and son and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O. and to be distributed as they should become of the age of 25 years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the testator's death who was an infant when the bill was filed. T. O. survived the testator and attained 25. Held that the bequest was void for remoteness. *Porter v. Fox.* 485

30. Testator bequeathed the whole of his property to his wife, for her life, and directed that upon her death, one-third should devolve on his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry again and have other children, her affection for her daughter would induce her to make the daughter her principal heir. The widow died unmarried. Held that she took an abso-

lute interest in the two-thirds, under the will. *Hay v. Master.* 568

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CONSTRUCTION OF ACTS OF PARLIAMENT.

1. Where the court, in any proceeding in a cause, declares a party to be a trustee within the meaning of 11 G. 4, & 1 W. 4, c. 60, it may, by the same order, direct a conveyance to be made. *Walton v. Merry.* 328

2. The 14 days mentioned in 11 G. 4, & 1 W. 4, c. 36, s. 11, are exclusive of the first and inclusive of the last day. *Ancdell v. Whitfield.* 356

3. By 53 G. 3, c. 159, the responsibility of shipowners for damage done by their ships to other vessels, is limited to the value of the ship doing the damage. Held that such value must be ascertained as at the time of the accident. *Dobree v. Schroder.* 291

4. The devisee of a mortgage is not a trustee for the executors of the testator, within 11 G. 4, & 1 W. 4, c. 60. *Ex parte. Payne.* 645

CONTEMPT.

An attachment had issued against a defendant for want of Answer. The answer was afterwards filed, and the defendant took an office copy of it, the costs of the contempt remaining unpaid. Held, that the plaintiff had waived his right to enforce payment of the costs by process of contempt. *Landars v. Allen.* 619

See CONSTRUCTION OF ACTS OF PARLIAMENT. DEFENDANT, 8.—PRACTICE, 8, 12, 16.

CONVERSION.

By a marriage settlement, the husband covenanted to pay, to the trustees, 1,200*l.* in trust, with the consent of the husband and wife and not without, to lay it out in the purchase of lands in fee, or for long terms of years, or of copyhold or customary tenure, and to settle the same on the husband for life, without impeachment of waste: remainder to the wife, for life, in bar of dower, remainder to the use of the children of the marriage as the husband and wife or the survivor of them should appoint, and, in default of appointment, to the use of all the children of the marriage in tail. The 1,200*l.* was invested in the funds, and so remained, with the

acquiescence of the husband and wife.— There was one child of the marriage.— The wife survived her husband and afterwards died. Held that the fund ought to be considered as personal estate. *Davies v. Goodhew.* 585

COPYRIGHT.

- A. made a copy of a print invented by B., in colours and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition until the right had been established at law. *Martin v. Wright.* 297

See PUBLIC POLICY.

COSTS.

1. The costs of a suit for specific performance, against the infant heir of the vendor, ordered to be paid out of the purchase-money. *Prytharch v. Harvard.* 9
2. Trustees who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate, but they afterwards sold it for 3,600*l.* The Court charged them with the loss but gave them their costs as their conduct had not been wilful or perverse. *Taylor v. Tabrum.* 281
3. Personal service of an order for payment of costs, by a plaintiff to a person not a party to the suit, will be dispensed with, where the plaintiff cannot be found. *Hunter v. —* 429
4. In a foreclosure suit, against an insolvent mortgagor and the provisional assignee of the Insolvent Court, who claims no interest, the plaintiff must pay the costs of the assignee and add them to his debt. *Weaving v. Count.* 439
5. By the decree on further directions in a creditor's suit, the costs of all parties were directed to be taxed as between solicitor and client and paid out of a fund in Court. The fund proving insufficient to pay the costs, the defendants, the heir and administrator of the debtor petitioned to be paid their costs in the first instance. But the Court directed the fund to be divided amongst all the parties in proportion to their costs. *Swale v. Milner.* 572

See NEW ORDERS, 7.—SOLICITOR AND CLIENT.

COVENANT.

- A vicar, whilst the 13 Elizabeth, c. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted if he should exchange his living, to secure the annuity by charging and demising the new living, and that, in

the meantime, it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Elizabeth. Held that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. *Metcalfe v. The Archbishop of York.* 224

2. Where a testator has entered into a voluntary covenant to pay an annuity, the annuitant is a specialty creditor on his real estates notwithstanding the annuity did not become in arrear till after the testator's death. *Jenkins v. Briant.* 603

CREDITOR.

See COVENANT.—DEBTOR AND CREDITOR.

CREDITOR'S SUIT.

By the decree on further directions, in a creditor's suit, the costs of all parties were directed to be taxed as between solicitor and client, and paid out of a fund in Court. The fund proving insufficient to pay the costs the defendants, the heir and administrator of the debtor, petitioned to be paid their costs, in the first instance. But the court directed the fund to be divided amongst all the parties, in proportion to their costs. *Swale v. Milner.* 572

See INFANT, 2.—INTERROGATORIES.

CROSS BILL.

A. being in possession of an estate under a decree in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose; A. then filed a cross bill against B., seeking for a discovery of matters relating to B.'s pedigree, and praying that B. might elect whether he would proceed at law or in equity, and that, if he elected the latter, that he might be perpetually restrained from proceeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Demurrer over-ruled. *Lowndes v. Davies.* 468

See CAUSE AND CROSS CAUSE.

CROSS-REMAINDERS.

Testator devised an estate to A. for life, remainder to trustees to preserve, &c., remainder to all the children of A., as tenants in common, and not as joint tenants, and, for want of such issue, to B. for life, remainder to trustees to preserve, &c., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue, to C. in Fee.

Held that the children of A. took estates for life, with cross-remainders between them, for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross remainders between them for life, with remainder to C. in fee. *Ashley v. Ashley.* 358

CUMULATIVE LEGACIES.

Testator, by a will duly attested, gave legacies to various persons, charged upon his real and personal estates, and payable at the end of two years after his death, and he directed that, if his property should be more than sufficient to pay the legacies, they should be increased proportionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, the testator gave legacies to many of the legatees in the will, either individually or as members of a family; but the directions as to the time of payment and the increase of the legacies were omitted. Held that the legacies in the unattested paper were not substitutional for the legacies in the will, but cumulative. *Strong v. Ingram.* 197

See CONSTRUCTION, 23—25.

DEBTOR AND CREDITOR.

1. C. brought an action against F. in the Lord Mayor's Court, for the recovery of a debt and issued an attachment against B., who had in his hands funds belonging to F. W. filed a bill against C. B. and F., claiming a lien on the funds, and obtained an injunction *ex parte*, to restrain proceedings in the action. Whilst the injunction was in force, F. became bankrupt. Held that though C. might, but for the injunction, have sued out execution long before F. became bankrupt, yet that he was not entitled to be paid otherwise than ratably with the other creditors. *Ullock v. Barber.* 300
2. A debtor conveyed certain of his estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the conveyance; but the trustees did not sell the estates, the creditors having received sums in or towards satisfaction of their debts, out of other estates conveyed by the debtor upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees of the first-mentioned estates and the debtor, stating as above, and that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and praying that his debt might be raised and paid out of such parts

of those estates as should not be sold for the payment of the scheduled debts, and that an account might be taken of the receipts and payments of the trustees, and for a receiver, and an injunction to restrain the trustees from paying any part of the rents or produce of the estates to the debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance, were not parties to the bill. Demurrer allowed. *Cocker v. Lord Egmont.* 311

3. Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff. *Newell v. Townsend.* 419
 4. A. made a voluntary assignment of a sum of money, being, at the time, indebted to B. on balance of a running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. *Whittington v. Jennings.* 493
- See CREDITOR'S SUIT.—DEED 3.—ESCROW. INFANT, 2.

DEBTS

See WILL, 13.

DEBTS AND LEGACIES.

See PURCHASER, 2, 3.

DECREE.

A testator devised his real estates to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R. and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information was filed, on behalf of two other parishes, claiming to participate in the charity, and a decree was made, in 1680, directing that the rents should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1806, an information was filed, on behalf of a fourth parish, for a similar purpose; and that parish was decreed to be entitled to a share of the rents, in proportion of its extent and population to the extent and population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final. *Attorney General v. The Mayor of Rochester.* 273

2. In a suit by a husband against his wife and children (whom he had deserted) respecting the wife's share in an intestate's estate, the decree referred it to the Master to approve of a proper settlement on the wife, with liberty to all parties to lay proposals before the Master. Before the report was made the wife died. Held that the children were entitled to the benefit of the decree. *Groves v. Perkins*. 584

See DEMURRER OF PAROL.—PLEA AND PLEADING, 5.—PRACTICE, 10, 18.

DEED

1. A. having received monies belonging to B. privately, and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death, the deed was discovered in a chest containing his title-deeds. Held that the deed was not an escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. *Exton v. Scott*. 31
2. By a marriage settlement estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs. Held that the husband did not take an estate in tail special, but for life only, and that the children took, by purchase as tenants in common in fee in remainder. *North v. Martin*. 266
3. A. assigned 800*l.* to trustees in trust during the life of B. or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessities, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition or engagements: and it was declared that, after his death, the 800*l.*, and all savings and accumulations of interest, if any, should be in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy. Held that his life interest passed to his assignees.—*Snowdon v. Dales*. 524

4. A wife, who had been deserted by her husband, became entitled to a share of an intestate's property, amounting to 3,600*l.* The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s.* a week, to himself for life. Although the deed recited that the intestate's estate was very considerable, yet, as the administrators, who were the wife's brothers and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside.—*Groves v. Perkins*. 576

5. A. being tenant in tail in remainder expectant on the death of B., entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B.'s life interest therein and to the raising, by mortgage or otherwise, of any sum or sums not exceeding 15,000*l.* for A.'s use, be settled to the uses thereafter expressed, covenanted that he would, subject to the raising, by any ways or means and at any time or times, he should think proper, of the sum or sums before mentioned, by mortgage, annuity, or otherwise for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest, do all necessary acts for settling the estates; subject to B.'s life interest, in the manner agreed upon. Held that A. was authorized to raise the 15,000*l.* by sale, and that he was justified in selling his interest in remainder in the whole of the estate, as the 15,000*l.* was nearly the full value of such interest. *Tasker v. Small*. 625

See PRODUCTION OF DOCUMENTS, 1, 2.

DEFENDANT.

1. An attachment issued against a defendant before the making of a motion by him, but after service of the notice of motion, will not prevent the motion being made.—*Jeyes v. Foreman*. 384
 2. The master being about to report the defendant's third answer insufficient, he put in a fourth answer, and then moved to stay the report. Motion refused, the court having no right to deprive the plaintiff of the benefit of the tenth order. *Russell v. Dight*. 430
 3. If a defendant makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it on the ground that they afford evidence of his being subject to the penalties. *Ewing v. Osbaldiston*. 608
- See ATTACHMENT.—CROSS-BILL.—DEMURRER OF PAROL.—PRACTICE, 18, 19.—PROCESS.

DEMURRER.

1. A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief. *Angell v. Westcombe.* 30
2. Where it appears on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the statute of limitations, but may demur. *Hoare v. Peck.* 51
3. A bill of interpleader is not demurrable because it does not offer to bring the money claimed into court. But the plaintiff must bring it in, before he takes any step in the cause. *Meux v. Bell.* 175
4. A bill of discovery is demurrable, if the words, "stand to and abide such order and decree thereon" are inserted in the prayer of process. *James v. Herriott.* 428

See CROSS-BILL.—INSOLVENT DEBTOR — MULTIFARIOUSNESS.—OUTSTANDING TERMS. PARTIES.—PRACTICE, 18, 19.

DEMURRER OF PAROL.

As the demurrer of the parol has been abolished by 11 Geo. 4, & 11 Will. 4, c. 47, an infant defendant is not entitled to have six months given to him after attaining 21, to show cause against a decree.—*Powys v. Mansfield.* 637

DESCENDANTS.
See REPRESENTATIVES.

DESCENT.

Testator devised his real estates to trustees in trust to pay an annuity, and, out of the residue of the rents, to maintain S. W. (who was his heir) until he attained 21, to convey the estates to him in fee; but, if he died under 21, then to J. S. in fee. S. W. attained 21. Held that he took the estates by descent. *Wood v. Skelton.* 176

DEVASTAVIT.
See EXECUTOR, 2—4.

DISCOVERY.
See BILL OF DISCOVERY.—CROSS-BILL.— PRODUCTION OF DOCUMENTS.

DISMISSAL OF BILL.
See PRACTICE, 2.

DISTRIBUTIVE SHARE.
See WIDOW.

DOUBLE PORTIONS.
See PORTIONS.

DOWER.
See WIDOW.

ECCLESIASTICAL COURT.

This court is not bound by the decision of the Ecclesiastical Court as to the effect of a bequest. *Hastings v. Hane.* 67

ECCLESIASTICAL BENEFICE.
See COVENANT.

ELECTION.
See CROSS-BILL.

EQUITABLE WASTE.
See WASTE.

ESCROW.

A. having received monies belonging to B., privately and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death, the deed was discovered in a chest containing his title deeds. Held that the deed was not an escrow, there being no evidences to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. *Erton v. Scott.* 31

ESTATE TAIL.
See TENANT IN TAIL.

EVIDENCE.

1. An uncle made a provision by his will, for his niece, and, afterwards by a settlement on her marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic evidence was admitted to show that the uncle stood in *loco parentis* to his niece.—*Powys v. Mansfield.* 528
2. Evidence cannot be read, even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. *Ibid.* 565

EXCEPTIONS.

1. On the hearing of exceptions to a Master's report, no parts of the answer can be read except those which were read before the Master. *Rands v. Pushman.* 46
2. If one general exception is taken to the Master's certificate, approving of interrogatories under a decree, and the Court is of opinion that one only of the interrogatories ought not to have been approved of, the exception will be allowed. *Moore v. Langford and Wife.* 323

3. The Master being about to report the defendant's third answer insufficient, he put in a fourth answer, and then moved to stay the report. Motion refused, the Court having no right to deprive the plaintiff of the benefit of the tenth order. *Russell v. Dight.* 430
4. Where a Master reports as to matter not referred to him, his report ought not to be excepted to, but it ought to be referred back to him to be reviewed, and even if that is not done, the unwarranted finding will be disregarded. *Jenkins v. Briant.* 603

EXCHANGE.

See POWER OF SALE AND EXCHANGE.

EXECUTION.

See DEBTOR AND CREDITOR, 3.

EXECUTOR.

1. A testatrix gave legacies of 100*l.* each, to A., B and C.; and, in a subsequent part of her will, she appointed them her executors. In the preceding clauses, she made devises and bequests "to her executors thereafter named," and "to her executors and trustees." A. neither proved nor acted. Held that he was not entitled to the legacy. *Piggott v. Green.* 72
 2. Executors who were directed by the will to call in the testator's personal estate, with all convenient speed, continued his trade for some years after his death, and ultimately a considerable loss was sustained. But the Court refused to charge them with the loss, as they had acted *bona fide*, and according to the best of their judgment. *Garrett v. Noble.* 504
 3. If a person interested under a will, files a bill for an account, against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff. *Ibid.*
 4. An executor will be allowed payments made by him to simple contract creditors of his testator, a bond being in existence but not payable, but he will not be allowed payments to legatees, notwithstanding he had no notice of the bond. *Norman v. Baldry.* 621
- See CREDITOR'S SUIT.—PRACTICE, 21.—VENDOR AND PURCHASER, 3.

EXONERATION.

A father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose and covenanted to pay the money. By his will

he directed his debts to be paid, first, out of the residue of his personal estate, then, out of his money in the funds, and, lastly, out of his residuary real estates. Held that the mortgaged estate was not to be exonerated from the portion out of the personal estate. *Graves v. Hicks.* 309

EXTRINSIC EVIDENCE.

See EVIDENCE.

FEME COVERT.

1. An order for payment to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. *Campbell v. Harding.* 283
 2. A trust for the separate use of a woman, whether single or married, is valid. *Davis v. Thornycroft.* 420
- See SEPARATE USE.

FORECLOSURE.

See COSTS, 4.

FORFEITURE.

See ALIENATION.

FRAUD.

1. A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered, under special circumstances, to be produced. *Kennedy v. Green.* 6
2. A wife who had been deserted by her husband, became entitled to a share of an intestate's property, amounting to 3,609*l.* The husband, whilst he was ignorant of the amount of the share assigned it in trust for his wife and children, subject to the payment of 10*s.* a week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet as the administrators, who were the wife's brothers and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside. *Groves v. Perkins.* 576

See ACCOUNT, 1.—PUBLIC POLICY

GUARDIAN.

Guardian appointed to an infant entitled to freehold property worth 80*l.* a year, without a reference. *Ex parte Jackson.* 213

HARD BARGAIN.

See AGREEMENT, 2.

HEIR.

Testator devised his real estates to trustees in trust to pay an annuity, and, out of the residue of the rents, to maintain S. W.

(who was his heir) until he attained 21, and, on his attaining 21, to convey the estates to him in fee; but, if he died under 21, then to J. S. in fee. S. W. attained 21. Held that he took the estates by descent. *Wood v. Skelton* 176

See CREDITOR'S SUIT.

HUSBAND AND WIFE.

Testator bequeathed 700*l.* to his daughter's husband, his executors, &c. in trust to pay the interest, to his daughter, for her separate use for life, and, after her death, to such persons as she should appoint by will, and, in default of appointment, to her personal representatives. The daughter died without having made any appointment. Held that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson v. Smith* 47

See CONSTRUCTION, 7, 20.—DECREE, 2.—DEED, 4.—FEME COVERT.—WIDOW.

IMPEACHMENT OF DECREE.

See PLEA AND PLEADING, 5.

IMPERTINENCE

See NEW ORDERS, 7.

IMPLIED GIFT.

See CONSTRUCTION, 18.—CROSS REMAINDERS.

INADEQUACY OF CONSIDERATION.

See FRAUD, 2.

INFANT.

1. Guardian appointed to an infant entitled to freehold property worth 80*l.* a year, without a reference. *Ex parte Jackson* 212

2. Where an infant has an allowance made to him, by his guardians, for his support, a tradesman is not entitled to be paid for articles supplied to the infant, on credit, unless he can make out that, having regard to the infant's circumstances and station (which he is bound to inquire into), the articles were necessities. *Mortara v. Hall* 465

3. Evidence cannot be read, even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. *Powys v. Mansfield* 565

See COSTS, 1.—DEMURRER OF PAROL.

INFANT TRUSTEE.

Where the Court, in any proceeding in a cause, declares a party to be a trustee within 11 Geo. 4 & 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made. *Walton v. Merry* 328

INFORMATION.

See CHARITY.

INJUNCTION.

1. A receiver having been appointed, in a creditor's suit, of the office of master forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest, from sporting in it. *Blanchard v. Cawthorne* 155

2. Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 G. 4 & 1 W. 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished. *Ellis v. Earl Grey* 214

3. Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the Court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. The Court will not give any assistance to a party seeking to enforce a hard bargain. *Kimberley v. Jennings* 340

4. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. *Lee v. Ravenscroft* 474

See AGREEMENT.—BANKRUPT.—COPYRIGHT.—DEBTOR AND CREDITOR, 1—3.—MULTIFARIOUSNESS.—PLEA AND PLEADING, 6.—WASTE.

INSOLVENT DEBTOR.

To a bill filed by the assignee of an insolvent debtor, the defendant pleaded that the consent of the creditors and the Insolvent Debtors' Court, to the institution of the suit, had not been obtained. Plea overruled. *Casborne v. Barsham* 317

In a foreclosure suit against an insolvent mortgagor and the provisional assignee of the Insolvent Court who claims no interest, the plaintiff must pay the costs of the assignee and add them to his debt. *Weaving v. Count* 439

INSUFFICIENCY.

See EXCEPTIONS, 3.

INTEREST.

Testator gave a legacy to his daughter, and all his real and personal estate to his wife, and, after her death, he gave his real estate, subject to the legacy, to his son in fee. The wife survived the testator, and afterwards died. Held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient. *Freeman v. Simpson* 75

See ACCOUNTS.—DEED, 2.

INTERPLEADER.

1. Where a principal has created a lien in favour of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. *Smith v. Hammond* 10
2. A bill of interpleader is not demurrable, because it does not offer to bring the money claimed into court. But the plaintiff must bring it in, before he takes any step in the cause. *Meuz v. Bell* 175

INTEROGATORIES

If, in a creditor's suit, a decree is made in the usual form, no special interrogatory for the examination of the defendants, ought to be allowed, although a case for directing special inquires, is made on the record. *Moore v. Langford and Wife* 322

See EXCEPTIONS, 23.—RE-EXAMINATION.

JOINTURE.

See CONSTRUCTION, 2.

JUDGMENTS.

Notice to a purchaser, of judgments against the vendor, whose estates is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments, under an exercise of the power reserved to the vendor. *Eaton v. Sanster* 517

See DEBTOR AND CREDITOR, 3.

JUDGMENT CREDITOR.

See DEBTOR AND CREDITOR, 2.

JURISDICTION.

1. Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo. 4 and 1 Will. 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished. *Ellis v. Earl Grey* 214
2. The proprietors of Covent-garden Theatre agreed with an actor, that he should act for 24 nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in London. Held that the Court cannot enforce the positive part of the contract, and therefore, it will not restrain, by injunction, a breach of the negative part. *Kemble v. Kean* 333

See AGREEMENT.

LEASEHOLDS FOR LIVES.

See CONSTRUCTION, 8

LEGACY.

1. A testator domiciled in Jamaica, became, during a temporary residence at Frankfurt, engaged and betrothed to a lady; and by a codicil to his will, after mentioning her by name, and alluding to his intended marriage with her, gave 3,000*l.* to his wife. During the engagement but before the marriage, the testator died. Held that the lady was entitled to the legacy. *Schloss v. Stuebel* 1
2. Testator gave, to his Wife, his house in B. and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it. Held that the legacy was adeemed. *Colleton v. Garth* 19
3. A testatrix gave legacies of 100*l.* each to A. B. and C.; and, in a subsequent part of her will, she appointed them her executors. In the preceding clauses she made devises and bequests "to her executors thereafter named," and "to her executors and trustee." A. neither proved nor acted. Held that the was not entitled to the legacy. *Piggott v. Green* 72
4. Testator gave a legacy to his daughter, and all his real and personal estate, to his wife, and, after her death, he gave his real estates, subject to the legacy, to his son in fee. The wife survived the testator, and afterwards died. Held that the legacy with interest from a year after the testator's death, was raiseable out of the real estate in case the personal estate was deficient. *Freeman v. Simpson* 75
5. Testator devised his estates, charged with debts and legacies. The devisee mortgaged the estate to A. subject, expressly, to the legacies, A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B. but not, expressly, subject to the legacies, and B. is informed, falsely, by the devisee that all the legacies had been paid. Held that B. took the estate subject to the legacies. *Rogers v. Rogers* 364
6. Testator directed his trustees to pay, to his daughters their portions on their marrying with the consent, in writing, of his trustees first had and obtained; and, on their marrying without such consent, that the trustees should stand possessed of their separate use, for life, with remainder to their children. A. proposed to the trustees to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were, that 500*l.* should be paid to A., on his marriage, out of her portion, and that the remainder should be invested, in the names of trustees, for her sole use and benefit, the interest to be paid to her

only. The daughter accepted the proposals, and asked the consent of the trustees. The same trustee then wrote a letter, to the daughter, saying that he and his co-trustee had not then signed the consent, but were ready to do so as soon as requisite; and a draft was prepared by which (subject to the payment of the 500*l.* to the husband) the portion was settled on the intended husband during his solvency, then on the intended wife, for her separate use, for life, with remainder to the children, with remainder to the survivor of the intended husband and wife. A. having made certain arrangements for the disposal of the 500*l.*, which the trustees disapproved of, the trustee who had written the letter refused to look at the draft of the settlement, saying he should expect A. to make some other proposals respecting the disposal of the 500*l.* Another arrangement was accordingly made and communicated to the trustee, but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented) was had, without further communication with him. Held that the letter was a sufficient consent on his part to the marriage. *Le Jeune v. Budd* 441

See CUMULATIVE LEGACIES.—PORTIONS, 1.
—PURCHASER, 3.—SPECIFIC LEGACY.—WILL, 12, 23.

LEGAL REPRESENTATIVES.

Testator gave 450*l.* to trustees, their executors, &c. in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son. And he gave the residue of his personal estate to his son, his executors, &c. Held that the words 'legal representatives' meant next of kin. *Walter v. Makin* 148

LENGTH OF TIME.

See REDEMPTION.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIVING.

See CHARGE ON BENEFICE.

LOCUS PARENTIS.

See SATISFACTION, 2, 3, 4.

LORDS OF THE TREASURY.

See INJUNCTION, 2.

MAINTENANCE.

Testator gave his residuary estate to trustees,

in trust for his sisters' younger children equally, and to vest in them at the usual periods, and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sisters, or to the guardians of the children, to be applied for their maintenance and education. Held that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. *Berkeley v. Swinburne* 613

MARRIAGE ARTICLES.

By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained, in the settlement, powers to the husband, to charge the estates, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c. usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid. Held that a power of sale and exchange might be introduced into the settlement. *Hill v. Hill* 136

See CONSENT TO MARRIAGE.—CONSTRUCTION, 13.—POWER OF SALE. SETTLEMENT.

MASTER IN ROTATION.

See CONSTRUCTION, 28.

MASTER'S CERTIFICATE.

See EXCEPTIONS, 2.

MASTER'S REPORT.

See REPORT.

MESSENGER.

See PRACTICE.

MISJOINDER.

See PARTIES, 2.

MISTAKE.

In taking accounts directed by the decree, certain payments which had been made by A. and B. jointly, were represented and reported by the Master to have been made by B. separately. After the report had been absolutely confirmed, and B. had become bankrupt, the Court, on the petition of A. discharged the order to confirm the report, and referred it back to the Master to review his report. *Prentice v. Mensall* 271

MORTGAGE.

1. A. and B. being seised in fee, in right of their wives, of two undivided fourth parts

of an estate, subject to a mortgage term, joined, in 1784, with the owner of the other moiety, in conveying the estate, by lease and release, but without a fine, to a purchaser in fee. The mortgage was paid off, and the term assigned to attend. The purchaser, and those claiming under him, had been in possession from the date of the conveyance. A.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. B.'s wife died in 1818, leaving the other plaintiff her heir. B. died in 1826. In 1830 the plaintiffs brought an ejectment, but were nonsuited by the defendants setting up the term. In 1831 they filed a bill to redeem, which was dismissed, on account of the length of possession by the defendants, and those under whom they claimed. *Ashton v. Milne* 369

2. A father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money. By his will, he directed his debts to be paid first out of the residue of his personal estate, then out of his money in the funds, and, lastly, out of his residuary real estates. Held that the mortgaged estate was not to be exonerated, from the portion, out of the personal estate. *Graves v. Hicks* 398
See CONSTRUCTION, 10.

MORTGAGOR AND MORTGAGEE.

- A. conveyed his estates to B., in trust to sell, and pay off a mortgage and other incumbrances on the estates, and to retain a debt due to B., and until the sale, to apply the rents in keeping down the interest on the charges, and to pay the surplus to A. B. took a transfer of the mortgage and entered into and remained in possession for 24 years, but did not sell the estates. For the first ten years the rents were less than the interest; but, afterwards, they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, and for a re-conveyance of the estates. But the Court refused to direct the rests. *Latter v. Dashwood* 462

See COSTS, 4.—MORTGAGE.
TRUSTEE.

MULTIFARIOUSNESS.

- A. died intestate, leaving a widow and infant children his next of kin. The widow, without taking out administration, possessed his assets and paid his debts, and died, having bequeathed her personal estate to the children, and appointed B. and C. her executors. D. then took out administration to the intestate and brought an action, as trustee for the children,

against B. and C. for monies alleged to be due from the testatrix to the intestate's estate. B. and C. together with the children, filed a bill against D. praying for all proper accounts of the assets of the intestate and testatrix, possessed by B. and C., and by D., and of what, if anything, was due from the testatrix's estate to the intestate's estate, and for an injunction to restrain the action. Held that the bill was not multifarious. *Lewis v. Edmund* 251

NECESSARIES.

Where an infant has an allowance made to him, by his guardians, for his support, a tradesman is not entitled to be paid for articles supplied to the infant, on credit, unless he can make out that, having regard to the infant's circumstances and station (which he is bound to inquire into), the articles were necessities. *Mortara v. Hall* 465

NEXT OF KIN.

See HUSBAND AND WIFE.—LEGAL REPRESENTATIVES.

NEW ORDERS.

1. The respondents to a charity petition are parties to it, and therefore they are not within the 44th order. *In re Willoughby's Charity* 18
2. The 17th order of 1831 does not apply, except in cases where the plaintiff requires a commission; in other cases the old practice remains unaltered. *Williams v. Janaway* 77
3. The orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. *Burrell v. Nicholson* 212
4. The time allowed by the 12th order for procuring the report as to the insufficiency of an answer, extended; the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertence, omitted to obtain the Master's certificate that further time was necessary to enable him to make his report. *Ibid* 212
5. Plaintiff obtained an order for a commission to examine witnesses, but did not take it out. Held that, under the 17th order of 1831, the defendant was entitled to take out a commission. *Rattenbury v. Fenton* 368
6. Where a decree in a cause in which previous references have been made, directs a reference to the Master in rotation, the decree will be carried to the Master to whom the previous references were made. *Attorney-general v. Shore* 460

7. Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference under the 22d order of 1833, without further order. *Desanges v. Gregory* 473
8. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill, until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. *Lee v. Ravenscroft* 474

NEWSPAPER.

See PUBLIC POLICY.

NOTICE.

See PLEA AND PLEADING, 3.—ORDER AND DISPOSITION.—VENDOR AND PURCHASER, 4.

OPENING BIDDINGS.

1. Biddings opened on an advance of 300*l.* on 5,030*l.* *Lawrence v. Halliday* 296
2. A motion to open biddings for several lots purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. *Goodall v. Pickford* 379
3. An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser, according to a valuation which had been made. A. purchased lot 1; the other lots were not sold. B. opened the biddings, and on the resale, purchased lots 1 and 2, for 2,140*l.*, and lot 3, at 380*l.* The court refused to open the biddings for lots 1 and 2, on the application of A., unless he would advance 10 per cent. on the price of the timber, as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should fetch the same price at the resale. *Bates v. Bonnor* 380

ORDER.

By a mistake in the Registrar's office, an order, made on an undertaking to speed, was erroneously drawn up. The order was discharged, with costs of the application to discharge it; it being the duty of the party who procures an order, to see that it is properly drawn up. *Landers v. Allen* 620

ORDER AND DISPOSITION.

A. on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on behalf of the owner, a certain sum for the freight of the ship, by two instalments, one to be paid

on the sailing of the ship, and the other, on the completion of the voyage. The owner being indebted to C., ordered, in writing, A. to pay to C. all monies he might receive under the charter-party; and, accordingly, A. paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed her voyage, and, afterwards, the owner became bankrupt. Held that the remainder of the freight was not in his order and disposition at his bankruptcy. *Gardner v. Lachlan* 407

ORDER FOR TIME.

See PRACTICE, 25.

ORDERS.

See NEW ORDERS.

ORIGINAL AND SUPPLEMENTAL BILL.

See PLEA AND PLEADING, 5.

ORNAMENTAL TIMBER.

See WASTE.

OUTSTANDING TERMS.

Demurrer allowed to a bill to prevent the setting up of outstanding terms, as it alleged, merely, that the defendant threatened to set up some outstanding term. Such a bill ought to state that there are such terms and what is the nature of them. *Stansbury v. Arkwright* 481

OWELTY OF EXCHANGE.

See POWER OF SALE AND EXCHANGE.

PARENT AND CHILD.

In a suit by a husband against his wife and children, (whom he had deserted), respecting the wife's share in an intestate's estate, the decree referred it to the Master to approve of a proper settlement on the wife, with liberty to all parties to lay proposals before the Master. Before the report was made, the wife died. Held that the children were entitled to the benefit of the decree. *Groves v. Perkins* 584

PAROL.

See DEMURRER OF PAROL.

PARTIES.

1. A debtor conveyed certain of his estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the conveyance, but the trustees

did not sell the estates, the creditors having received sums in or towards satisfaction of their debts, out of other estates conveyed by the debtor upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees of the first mentioned estates and the debtor, stating as above, and that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and praying that his debt might be raised and paid out of such parts of those estates as should not be sold for payment of the scheduled debts, and that an account might be taken of the receipts and payments of the trustees, and for a receiver, and an injunction to restrain the trustees from paying any part of the rents or produce of the estates, to the debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance were not parties to the bill. Demurrer allowed. *Cocker v. Lord Egmont* 311

2. A bill is not demurrable because the legatees of a testator join with his executor in suing for a debt due to his estate. *Rhodes v. Warburton* 617

PARTITION.

A tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, may file a bill for a partition, and the decree will be binding on the sons when *in esse*. *Gaskell v. Gaskell* 643

PARTNERSHIP.

By articles of partnership it was agreed that just and true accounts should be made out half yearly, and signed by the partners; and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and after the death of two of the other partners it was discovered that the accounts were fraudulent. Held that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. *Oldaker v. Lavender* 239

See DEBTOR AND CREDITOR, 3.

PAYMENTS.

See DEBTOR AND CREDITOR, 4.

PERPETUATION OF TESTIMONY.

See PRACTICE, 20.

PERSONAL ESTATE.

See MORTGAGE, 2.

PERSONAL REPRESENTATIVES.

See HUSBAND AND WIFE.—REPRESENTATIVES.

PETITION.

See SERVICE.

PLAINTIFF.

A bill was filed against two trustees alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees, in their answer, admitted that they had both acted in the trusts. The plaintiffs, however, did not amend their bill. Held that they were nevertheless entitled to charge both the trustees with the loss occasioned by the breach of trust. *Taylor v. Tabrum* 281

See CONTEMPT.—CROSS-BILL.—EXCEPTIONS, 3

PLEA AND PLEADING.

1. Where it appears on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the Statute of Limitations, but may demur. *Hoare v. Peck* 51
2. To a bill filed by the assignee of an insolvent debtor, the defendant pleaded that the consent of the creditors and of the Insolvent Debtors' Court to the institution of the suit, had not been obtained. Plea overruled. *Casborne v. Barsham* 317
3. Defendant pleaded, to the whole bill, that he was a purchaser for valuable consideration, without notice, and, by answer in support of the plea, denied the charges of notice. Held that the answer overruled the plea. *Lord Portarlington v. Soulby* 356
4. A bill was filed against A. and others, but, before he was served with a subpoena, he went abroad. The bill was then amended by stating that A. was out of the jurisdiction, and a decree was made. A. then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served with process. The defendants demurred on the ground that the decree could not be impeached except by a supplemental bill in the first suit. Demurrer over-ruled. *Waterton v. Croft* 431
5. A. being in possession of an estate under a decree in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose; A. then filed a cross bill against B., seeking for a discovery of matters relating to B.'s pedigree, and praying that

- B. might elect whether he would proceed at law or in equity, and if he elected the latter, that he might be perpetually restrained from proceeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Demurrer overruled *Loundes v. Davies* 468
6. Demurrer allowed to a bill to prevent the setting up of outstanding terms, as it alleged, merely, that the defendant threatened to set up some outstanding term. Such a bill ought to state that there are such terms and what is the nature of them. *Stansbury v. Arkwright* 481
7. A bill is not demurrable because the legatees of a testator join with his executor in suing for a debt due to his estate. *Rhodes v. Warburton* 617
8. A. died indebted to B. C. took out administration to A., got in his estate, and afterwards died. D. took out administration to A. B. filed a bill against D. and C.'s executor, for an account of A.'s estate possessed by D. and by C. The executor pleaded an account stated by him to D. after the filing of the bill and a release executed to him by D. on payment of the balance, but did not annex the account to his plea. Held that the plea was not double, and that it was not necessary to annex the account. *Holland v. Sproule* 623
- See DEMURRER.—MULTIFARIOUSNESS.—PARTIES.

PORTIONS.

1. On a marriage, the father and husband of the lady gave bonds for 3,000*l.* each, to be paid to the trustees upon the trusts of the settlement. The father died, leaving the whole of the principal, and some of the interest due on his bond, and having bequeathed 3,000*l.* to his executors, upon the same trusts for the benefit of his daughter, and her husband and their issue, as were declared, by the settlement, of the trust-moneys therein comprised. Held that the legacy was not a satisfaction of the father's bond. *Foster v. Evans* 15
2. Testator being seized of a reversion in fee expectant on the death and failure of issue male of himself and his brother, and being possessed of a leasehold estate, and of stock in the funds, devised the reversion to the trustees for the term of 1,000 years and gave to them the leasehold estate and stock, in trust to raise 10,000*l.*, which he directed to be held in trust for his niece Julia, the daughter of his brother, for life, and after her decease

in trust for any husband who might survive her, and, after the decease of the survivor of them, in trust for all the children of his niece who should be then living. The niece married about three months after the date of the will: and, by a settlement made in contemplation of the marriage, the testator, in consideration of natural love, &c. for his niece Julia, the daughter of his brother, and for her advancement in life and to provide a maintenance for her, charged the reversion with the payment (after the death of the survivor of himself and his brother without leaving issue male who should attain 21) of the interest of 10,000*l.* to his niece's husband for life, and after his decease, to his niece for life, and, after the decease of the survivor with the payment of 10,000*l.* to trustees in trust for the younger children of the marriage. About a year afterwards the testator by a codicil, disposed of a certain portion of his property, not before mentioned, and, in all other respects, confirmed his will. The testator died a bachelor. His brother afterwards died leaving issue Julia and five other daughters. Held that the provision made by the settlement was not a satisfaction of the provision made by the will. *Povys v. Mansfield* 518

3. An uncle made a provision by his will for his niece, and afterwards by a settlement on her marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic evidence was admitted to show that the uncle stood *in loco parentis* to his niece *Ibid.*

4. No person can be held to stand *in loco parentis* to a child whose father is living, and who resides with and is maintained by the father according to his means. *Ibid.*

5. By a marriage settlement, a term of years was created for raising portions for younger children, which were to vest at usual periods, but were not to be paid till after the father's death. And there were the usual clauses for survivorship and maintenance, and also a proviso that any advance of money, made by the father in his lifetime, to the children, should be a satisfaction *pro tanto* of their portions, unless the father should, in writing, direct the contrary. The father devised all his real estates not in settlement, to trustees in trust to sell and pay his debts &c. and to pay the surplus equally amongst all his children (except his eldest son) at the usual times; and, if any of them died under 21 leaving issue, their shares were to go to their issue, but if they left no issue, then to the survivors; and the will contained a clause for the advancement of the children, but was silent with

respect to the provision being a satisfaction of the portions. The eldest son filed a bill insisting that the provision by the will, was intended to be a satisfaction of the portions. Some of the younger children demurred. The Court was of opinion that the provision by the will, although it was to arise from the sale of lands, and although the will contained no declaration on the subject, might be a satisfaction of the portions. But the demurrer was overruled, as it could not appear, until the hearing, whether there would be any fund that might be a satisfaction. *Fazakerley v. Gillibrand* 591
See CONSTRUCTION, 19.—LEGACY 6.

POWER.

See CONSTRUCTION, 4, 13, 18.—PROBATE DUTY.—SCOTCH SETTLEMENT.—VENDOR AND PURCHASER, 4.—WILL, 23.

POWER OF SALE.

A. being tenant in tail in remainder expectant on the death of B., entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to the life interest therein, and to the raising, by mortgage or otherwise, of any sum or sums not exceeding 15,000*l.* for his use, be settled to the uses thereafter expressed, covenanted that he would, subject to the raising by any ways or means and at any time or times he should think proper, of the sum or sums before-mentioned by mortgage, annuity or otherwise for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest, do all necessary acts for settling the estate, subject to the life interest in the manner agreed upon. Held that A. was authorized to raise the 15,000*l.* by sale; and that he was justified, in selling his interest in the whole of the estate, as the 15,000*l.* was nearly the full value of such interest. *Tasker v. Small* 625

POWER OF SALE AND EXCHANGE.

1. The donees of a power of sale and exchange, may pay money for owelty of exchange although they are not expressly authorized so to do. *Bartram v. Whickate* 86
2. By marriage articles, it was agreed that the estates should be settled in strict settlement, and that there should be contained in the settlement powers to the husband, to charge the estates by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c. usually inserted in settlements

of the like nature, and which should be proper for effecting any of the purposes aforesaid. Held that a power of sale and exchange might be introduced into the settlement. *Hill v. Hill* 136

POWER TO APPOINT NEW TRUSTEES.

See CONSTRUCTION, 13.

PRACTICE.

1. On the hearing of exceptions to a Master's report, no parts of the answer can be read, except those which were read before the Master. *Rands v. Pushman* 46
2. The 17th order of 1831, does not apply except in cases where the plaintiff requires a commission: in other cases the old practice remains unaltered. *Wilhams v. Jenaway* 77
3. The order for confirming absolutely a Master's report as to a purchase, when served, operates from the day on which it was pronounced. *Aberdeen v. Watkin* 146
4. Motion by a defendant for the production of a document admitted by the plaintiff to be in his custody, refused. *Miltigan v. Mitchell* 186
5. The orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. *Burrell v. Nicholson* 212
6. The time allowed by the 12th order for procuring the report as to the insufficiency of an answer was extended, the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertence, omitted to obtain the Master's certificate that further time was necessary to enable him to make his report. *Ibid.* 219
7. An order for payment, to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. *Compbell v. Harding* 283
8. The defendant had been taken under an attachment for want of answer, but, on his paying the sheriff 40*l.* to be repaid on putting in his answer, the sheriff, at the request of the plaintiff's agent, discharged him. Motion for a messenger to take the defendant, who had not put in his answer, refused. *Swindell v. Swindell* 295
9. A defendant who had been taken on an attachment for want of appearance, was discharged under 11 Geo. 4, & 1 Will. 4, c. 36, before plaintiff got an appearance entered for her. Held that, though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. *Williams v. Townshend* 296

10. Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. *Woollams v. Baker* 316
11. Where a defendant has been served with a subpoena under 2 & 3 Will. 4, c. 33, personal notice must be given to him before any subsequent process is applied for. *Hasluck v. Stewart* 321
12. The 14 days mentioned in 11 Geo. 4, & 1 Will. 4, c. 36, s. 11, are exclusive of the first and inclusive of the last day. *Ansdell v. Whitfield* 356
13. Plaintiff obtained an order for a commission to examine witnesses but did not take it out. Held that, under the 17th order of 1831, the defendant was entitled to take out a commission. *Rattenbury v. Fenton* 368
14. A motion to open biddings for several lots purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. *Goodall v. Pickford* 379
15. An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser according to a valuation which had been made. A. purchased lot 1: the other lots were not sold. B. opened the biddings, and, on the resale, purchased lots 1 and 2 for 2,140*l.*, and lot 3 at 380*l.* The court refused to open the biddings for lots 1 and 2 on the application of A., unless he would advance 10 per cent. on the price of the timber as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should not fetch the same price at the resale. *Bates v. Bonnor* 380
16. An attachment issued against a defendant before the making of a motion by him, but after service of the notice of motion, will not prevent the motion being made. *Jeyes v. Foreman* 384
17. Personal service of an order for payment of costs by a plaintiff, to a person not a party to the suit, will be dispensed with where the plaintiff cannot be found. *Hunter v. —* 429
18. A bill was filed against A. and others; but, before he was served with a subpoena, he went abroad. The bill was then amended, by stating that A. was out of the jurisdiction, and a decree was made. A. then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served with process. The defendants demurred on the ground that the decree could not be impeached except by a supplemental bill in the first suit. Demurrer over-ruled. *Waterton v. Croft* 431
19. The Court still has jurisdiction to make an order for time to answer on the overruling of a demurrer. *Ibid* 431
20. Leave given to plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. *Lancaster v. Lancaster* 439
21. Motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed, as against the deceased, granted. *Burnell v. The Duke of Wellington* 461
22. Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference, under the 22d order of 1833, without further order. *Desanges v. Gregory* 473
23. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. *Lee v. Ravenscroft* 474
24. Evidence cannot be read even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. *Poveys v. Mansfield* 565
25. The defendant's time for answering having expired, the plaintiff's clerk in court gave notice, on a Saturday, that he must attach the defendant at the next private seal, which was on Monday following; and, on that day, the plaintiff sealed an attachment. On the same day, the defendant, not knowing that the attachment had been sealed, applied for an order for time, and gave notice to the plaintiff's clerk in court, that he had done so. The attachment was discharged without costs, as the defendant had used due diligence in obtaining the order for time. *Taylor v. Fisher* 566
26. Commission to examine witnesses at Madras, directed to the judges of the Supreme Court there. *Murray v. Lawford and Others* 573
27. Where a Master reports as to matter not referred to him his report ought not to be excepted to, but it ought to be referred back to him to be reviewed; and even if that is not done, the unwarranted finding will be disregarded. *Jenkins v. Briant* 603
28. A. filed a bill against B., which B. answered, and then filed a cross-bill against A. A. not having answered the cross-bill, B. issued an attachment against him but was unable to serve it as A. was resident abroad. A. proceeded to examine witnesses in his cause. The Court on the application of B. ordered publication not to pass in A.'s suit until he should have put in his answer and cleared his contempt in B.'s suit, and the Court should order publication to pass. *Palmer v. Leycester* 610

29. An attachment had issued against a defendant for want of answer. The answer was afterwards filed, and the defendant took an office copy of it, the costs of the contempt remaining unpaid. Held that the plaintiff had waived his right to enforce payment of the costs by process of contempt. *Landars v. Allen* 619
30. By a mistake in the Registrar's office, an order, made on an undertaking to speed, was erroneously drawn up. The order was discharged, with costs of the application to discharge it; it being the duty of the party who procures an order, to see that it is properly drawn up. *Ibid* 620
31. As the demurrer of the parol has been abolished by 11 Geo. 4, & 1 Will. 4, c. 47, an infant defendant is not entitled to have six months given to him after attaining 21, to show cause against a decree. *Powys v. Mansfield* 637
- See CROSS BILL.—NEW ORDERS.—OPENING BIDDINGS.—RE-EXAMINATION.

PRINCIPAL AND AGENT.

Where a principal has created a lien in favour of another person on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. *Smith v. Hammond* 10

PRINTS AND ENGRAVINGS.

A. made a copy of a print invented by B., in colours, and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition, until the right had been established at law. *Martin v. Wright* 297

PRIORITY.

See CONSTRUCTION, 9. 24.

PRO CONFESSO.

Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. *Wooliams v. Baker* 316

PROBATE DUTY.

A testator gave to A. a power to dispose, by her will, of 5,000*l.*, part of his estate, on which probate duty was paid. A exercised the power by her will. Held that probate duty was not again payable in respect of the 5,000*l.* *Vandiest v. Fynmore* 570

PROCESS.

1. The defendant had been taken under an attachment for want of answer, but, on his paying the sheriff 40*l.* to be repaid

on putting in his answer, the sheriff at the request of the plaintiff's agent discharged him. Motion for a messenger to take the defendant who had not put in his answer, refused. *Swindell v. Swindell* 295

2. Where a defendant has been served with a subpoena under 2 & 3 Will. 4, c. 33, personal notice must be given to him before any subsequent process is applied for. *Hasluck v. Stewart* 321

See DEMURRER, 4.

PRODUCTION OF DOCUMENTS.

1. A deed in the custody of a purchaser for valuable consideration which the bill impeached for fraud, ordered, under special circumstances, to be produced. *Kennedy v. Green* 6
2. A voluntary deed belonging to the defendant, which the bill impeached for fraud, and which was in the custody of the defendant's solicitor, who claimed a lien on it, ordered to be produced for the plaintiff's inspection, after it had been proved by the defendant, and publication had passed. *Fencott v. Clarke* 8
3. Motion by a defendant for the production of a document admitted by the plaintiff to be in his custody, refused. *Miltigan v. Mitchell* 186
4. To a bill for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for 20 years before and at his death, and for an inspection of the bank books containing the entries of such stock, the bank, in their answer, set forth an account of the stock but declined to set forth a list of the books containing the entries. Held that they were not exempted from the production of their books, and therefore ought to set forth a list of them. *Heslop v. The Bank of England* 192
5. If a defendant makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it, on the ground that they afford evidence of his being subject to the penalties. *Ewing v. Osbaldiston* 608

PUBLIC POLICY.

A. the proprietor of a newspaper, prevailed on B. to make and deliver to the Stamp-office, an affidavit that he, B., was the proprietor of the paper. B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud. Held that, as B. had at A.'s instance violated the 38 Geo. 3, c. 78, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, his

assignees were not entitled to the relief asked. *Harmer v. Westmacott* 284

PURCHASER.

1. A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered under special circumstances to be produced. *Kennedy v. Green* 6
2. Testator devised his estates charged with debts and legacies. The devisee mortgaged the estate to A., subject, expressly, to the legacies. A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B., but not expressly subject to the legacies, and B. is informed, falsely, by the devisee, that all the legacies had been paid. Held B. took the estate subject to the legacies. *Rogers v. Rogers* 364
3. A purchaser from a devisee subject to debts and legacies, is bound to see his money applied in payment of the legacies, if the circumstances of the transaction afford evidence that the debts have been paid, and that the devisee is dealing with the estate as owner. *Johnson v. Kennett* 384

See REDEMPTION.—VENDOR AND PURCHASER.

PURCHASER FOR VALUABLE CONSIDERATION.

See PLEA AND PLEADING, 3.

RECEIVER.

A receiver who had been discharged, did not pay in his balance, on the day fixed by the Master. Ordered that he should pay in the same, and also the amount allowed for his salary, with interest. *Harrison v. Boydell* 211

See COVENANT.—INJUNCTION.

RECEIPTS FOR PURCHASE MONEY.

See VENDOR AND PURCHASER, 3.

RECOVERY.

If a tenant in tail suffers a recovery and declares uses which are void, he does not take back an estate tail, but an estate in fee. *Tanner v. Radford* 21

REDEMPTION.

A. and B. being seised in fee, in right of their wives, of two undivided fourth parts of an estate, subject to a mortgage term, joined, in 1784, with the owner of the other moiety in conveying the estate, by

lease and release, but without a fine, to a purchaser in fee, and the mortgage was paid off, and the term assigned to attend. The purchaser and those claiming under him had been in possession from the date of the conveyance. A.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. B.'s wife died in 1818, leaving the other plaintiff her heir. B. died in 1826. In 1830 the plaintiffs brought an ejectment, but were nonsuited by the defendants setting up the term. In 1831 they filed a bill to redeem, which was dismissed on account of the length of possession by the defendants and those under whom they claimed. *Ashton v. Milne* 369

RE-EXAMINATION.

Liberty given to the plaintiff to re-examine one of his witnesses to part of an interrogatory as to which the examiner had omitted to take down the deposition. *Bridge v. Bridge* 352

RELEASE.

See PLEA AND PLEADING, 8.

REMAINDERS.

See CROSS-REMAINDERS.

RE MOTENESS.

Testator gave annuities to his widow and son and directed the surplus of his personal estate and the rents of his real estate to be invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time and times should arrive when distribution should be made, as thereby directed. The Testator then directed his real estates to be sold after the decease of the survivor of his wife and son and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O. and to be distributed as they should become of the age of 25 years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the testator's death who was an infant when the bill was filed. T. O. survived the testator and attained 25. Held that the bequest was void for remoteness. *Porter v. Fox* 485

REPORT.

In taking accounts directed by the decree,

certain payments which had been made by A. and B. jointly were represented, and reported by the master to have been made by B. separately. After the report had been absolutely confirmed, and B. had become bankrupt, the Court, on the petition of A. discharged the order to confirm the report, and referred it back to the Master to review his report. *Prentice v. Mensal* 271

See EXCEPTIONS, 2.—PRACTICE, 1. 3. 27.

REPRESENTATIVES.

The word "representatives" in a will, construed to mean descendants, the context requiring it *Styth v. Monro* 49

See LEGAL REPRESENTATIVES.—PERSONAL REPRESENTATIVES.

RESIDUARY BEQUEST.

A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my monies, securities for money and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor v. Taylor* 246

See CONSTRUCTION, 14.

RESTRAINT ON ALIENATION.

See ALIENATION.

RESTS.

See ACCOUNT, 2.

RESULTING USE.

See TENANT IN TAIL.

REVIVOR.

Motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed as against the deceased, granted. *Burnell v. The Duke of Wellington* 461

See ACQUIESCENCE.

REVOCATION.

A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants. Held that though the contracts were properly abandoned, the will was revoked as to the

premises therein comprised. *Tebbutt v. Voules* 40

SALE AND EXCHANGE.

See POWER OF SALE AND EXCHANGE.

SATISFACTION.

1. On a marriage, the father and husband of the lady, gave bonds, for 3,000*l.* each, to be paid to trustees upon the trusts of the settlement. The father died leaving the whole of the principal and some of the interest due on his bond, and having bequeathed 3,000*l.* to his executors upon the same trusts, for the benefit of his daughter and her husband and their issue, as were declared by the settlement of the trust-monies therein comprised. Held that the legacy was not a satisfaction of the father's bond. *Foster v. Evans.* 15
2. Testator being seised of a reversion in fee expectant on the death and failure of issue male of himself and his brother, and being possessed of a leasehold estate and of stock in the funds, devised the reversion to trustees for the term of 1,000 years and gave to them the leasehold estate and stock, in trust to raise 10,000*l.*, which he directed to be held in trust for his niece Julia, the daughter of his brother, for life, and, after her decease, in trust for any husband who might survive her, and, after the decease of the survivor of them, in trust for all the children of his niece who should be then living. The niece married about three months after the date of the will: and, by a settlement made in contemplation of the marriage, the testator, in consideration of natural love, &c. for his niece Julia, the daughter of his brother, and for her advancement in life and to provide a maintenance for her, charged the reversion with the payment (after the death of the survivor of himself and his brother without leaving issue male who should attain 21) of the interest of 10,000*l.* to his niece's husband for life, and after his decease, to his niece for life, and, after the decease of the survivor, with the payment of 10,000*l.* to trustees in trust for the younger children of the marriage. About a year afterwards, the testator, by a codicil, disposed of a certain portion of his property not before mentioned, and, in all other respects, confirmed his will. The testator died a bachelor. His brother afterwards died leaving issue Julia and five other daughters. Held that the provision made by the settlement was not a satisfaction of the provision made by the will. *Powys v. Mansfield* 528
3. An uncle made a provision, by his will, for his niece and afterwards by a settle-

ment on her marriage. The question being whether the latter was intended to be a satisfaction for the former, extrinsic evidence was admitted to show that the uncle stood *in loco parentis* to his niece.

Ibid

4. No person can be held to stand *in loco parentis* to a child whose father is living and who resides with and is maintained by the father according to his means.

Ibid

5. By a marriage settlement, a term of years was created for raising portions for younger children, which were to vest at the usual periods, but were not to be paid till after the father's death. And there were the usual clauses for survivorship and maintenance, and also a proviso that any advance of money made by the father in his lifetime to the children, should be a satisfaction, *pro tanto*, unless the father should, in writing, direct the contrary. The father devised all his real estates not in settlement to trustees, in trust to sell and pay his debts, &c., and to pay the surplus equally amongst all his children, (except his eldest son) at the usual times, and if any died under 21 leaving issue, their shares were to go to their issue, but, if they left no issue, then to the survivors; and the will contained a clause for the advancement of the children, but was silent with respect to the provision being a satisfaction of the portions. The eldest son filed a bill, insisting that the provision by the will was intended to be a satisfaction of the portions. Some of the younger children demurred. The Court was of opinion that the provision by the will, although it was to arise from the sale of lands, and although the will contained no declaration on the subject, might be a satisfaction of the portions. But the demurrer was overruled, as it could not appear, until the hearing, whether there would be any fund that might be a satisfaction. *Fazakerley v. Gillibrand* 591

SCANDAL.

See NEW ORDERS, 7.

SCOTCH SETTLEMENT.

By a Scotch settlement, a sum of stock, was settled on the husband and wife for their lives, and, after the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife: and she was empowered at any time in her life, and even on death-bed, to bequeath or dispose of the stock to any person and in any manner she might think proper. Held that the power was not intended to be available, except in the event of there being a failure of children of the marriage. *Peddie v. Peddie* 78

SECURITIES FOR MONEY.

See WILL, 9.

SEPARATE USE.

1. By a marriage settlement, money and stock were assigned to trustees, in trust to receive the income, during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation; and it was declared that the income should not be subject to the debts, &c. of R. G., her intended husband, and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again. Held that the provision for the separate use of the lady without anticipation, was confined to the first marriage. *Knight v. Knight* 121
2. Testator directed the interest of 10,000*l.* to be for the separate use of his daughter Jane Lane, for her life, free from the debts of her husband. The husband died, and his widow married again. Held that the trust for her separate use ceased on the death of her first husband. *Benson v. Benson* 126
3. A trust for the separate use of a woman, whether single or married, is valid. *Davies v. Thornycroft* 420

SETTLEMENT.

By a marriage settlement, money and stock were assigned to trustees, in trust, to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation, and it was declared that the income should not be subject to the debts, &c. of R. G., her intended husband, and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again. Held that the provision for the separate use of the lady without anticipation, was confined to the first marriage. *Knight v. Knight* 121

See CONSTRUCTION, 13. 20.—DECREE, 2.—DEED, 5.—MARRIAGE ARTICLES.—PORTIONS, 1.—POWER OF SALE AND EXCHANGE.—SCOTCH SETTLEMENT.

SHIP.

By the 53 G. 3, c. 159, the responsibility of shipowners for damage done by their ships to other vessels, is limited to the value of

the ship doing the damage. Held that such value must be ascertained as at the time of the accident. *Dobree v. Schroder* 291

See BANKRUPT, 2.

SIDE-CLERK IN THE EXCHEQUER.

See INJUNCTION, 2.

SOLICITOR AND CLIENT.

1. If a solicitor retains money received by him, in his character of solicitor, for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law or equity. *In Re Barker* 476
2. Items in a solicitor's bill for preparing and settling a bill in equity, will render the solicitor's bill taxable, though the bill in equity was never filed. *Semble. Ibid*

SPECIALTY DEBT.

Where a testator has entered into a voluntary covenant to pay an annuity, the annuitant is a specialty creditor on his real estates, notwithstanding the annuity did not become in arrear till after the testator's death. *Jenkins v. Briant* 603

SPECIFIC LEGACY.

Testator bequeathed 7,000*l.* secured on mortgage of an estate at W. belonging to R. T. The 7,000*l.* and interest were received, after the date of the will, by the Testator's agent on his account, and, immediately afterwards, 6,000*l.* part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. Held that the legacy was specific, and, notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. *Gordner v. Hatton* 93

See ADEMPMENT, 1.

SPECIFIC PERFORMANCE.

The costs of a suit for specific performance against the infant heir of the vendor, ordered to be paid out of the purchase-money. *Prytarch v. Havard* 9

See AGREEMENT.

STATUTES.

See CONSTRUCTION OF ACTS OF PARLIAMENT.

STATUTE OF LIMITATIONS.

See DEMURRER, 2.—REDEMPTION.

SUBPCENA.

See ATTACHMENT.

SUBSTITUTIONAL LEGACIES.

See CUMULATIVE LEGACIES.
WILL, 21.

SUPPLEMENTAL BILL.

See PRACTICE, 18.

TAXATION OF BILL.

See SOLICITOR AND CLIENT.

TENANT FOR LIFE.

1. A mansion-house, park, and pleasure grounds with certain villas on the estate, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials and apply the proceeds in paying off incumbrances on the estates. The house was, accordingly, pulled down, but the tenant for life unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. *Wellesley v. Wellesley* 497
2. A tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, may file a bill for a partition; and the decree will be binding on the sons when in esse. *Gaskell v. Gaskell* 643

See CONSTRUCTION, 23.

TENANT IN TAIL.

If a tenant in tail suffers a recovery, and declares uses which are void, he does not take back an estate tail, but an estate in fee. *Tanner v. Radford* 21

TIMBER.

See WASTE.

TITLE.

Testator by his will in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living, but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth and Others v. Smith* 161

See VENDOR AND PURCHASER.

TRUST.

See WILL, [24](#).

TRUST FOR SEPARATE USE.

A trust for the separate use of a woman, whether single or married, is valid. *Davies v. Thornycroft* [420](#)

TRUSTEE.

The devisee of a mortgage is not a trustee for the executors of the testator within [11 G. 4 & 1 W. 4, c. 60](#). *Ex Parte Payne* [645](#)

TRUSTEE AND CESTUI QUE TRUST.

Trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of [6,600*l.*](#) for the estate; but they afterwards sold it for [3,600*l.*](#) The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse. *Taylor v. Tabrum* [281](#)

See EXECUTOR, [2](#).—INFANT TRUSTEE.—PLAIN. TIFE.—VENDOR AND PURCHASER, [3](#).

USES.

See TENANT IN TAIL.

VENDOR AND PURCHASER.

1. The donees of a power of sale and exchange, may pay money for owelty of exchange, although they are not expressly authorized so to do. *Bartram v. Wichcote* [86](#)
2. Testator by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall, had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth and Others v. Smith* [161](#)
3. Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges: and he directed

his trustees to complete any contracts, for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death. Held that his executor was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by the testator. *Eaton v. Sanster* [517](#)

4. Notice to a purchaser of judgments against the vendor, whose estate is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments under an exercise of the power reserved to the vendor. *Ibid*
See DEED, [4](#).—PRACTICE, [3](#).—PURCHASER, [2, 3](#).—OPENING BIDDINGS. SPECIFIC PERFORMANCE.

VESTING.

See CONSTRUCTION, [19, 27](#).

VOLUNTARY DEED.

- A. made a voluntary assignment of a sum of money being, at the time, indebted to B. on balance of a running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. *Whittington v. Jennings* [493](#)
See ESCROW.—PRODUCTION OF DOCUMENTS, [2](#).

WAIVER.

See CONTEMPT.

WASTE.

- A mansion-house, park, and pleasure grounds, with certain villas on the estate, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials and apply the proceeds in paying off incumbrances on the estates. The house was, accordingly, pulled down, but the tenant for life unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. *Wellesley v. Wellesley* [497](#)

WIDOW.

- A rent-charge expressed to be for a jointure, and in lieu of dower and thirds at common law, does not bar the jointress of her distributive share in her husband's undisposed-of personal estate. *Colleton v. Garth* [19](#)

WILFUL DEFAULT.

See EXECUTOR, [2, 3](#).

WILL.

1. A testator devised all his real estates to his children equally, and, afterwards, entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants. Held, that though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. *Tebbutt v. Voules* 40
2. Testator bequeathed 700*l.* to his daughter's husband, his executors, &c. in trust to pay the interest to his daughter, for her separate use for life, and after her death, to such persons as she should appoint by will, and, in default of appointment, to her personal representatives. The daughter died without having made any appointment. Held that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson v. Smith* 47
3. The word "representatives" construed to mean "descendants," the context of the will requiring it. *Styth v. Monro* 49
4. Testator bequeathed the remainder of his property to his sister, A. B., to dispose of amongst her children as she might think proper. Held that A. B. took no interest in the residue. *Blakeney v. Blakeney* 52
5. Testatrix devised all her messuages situate in Denmark-court. She had five houses situate in the court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place where the others were situate, and which had attached to the back of it an outbuilding abutting on ground in Denmark-court. Held that the five houses only passed. *Newton v. Lucas* 54
6. A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide equally, any monies which might remain to his account, after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money accounts subsisting between him and his bankers, and other persons. Held that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies. *Hastings v. Hane* 67
7. This Court is not bound by the decision of the Ecclesiastical Court as to the effect of a bequest. *Ibid.*
8. A testator seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever." Held that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall v. Brome* 69
9. Testator gave to his son, in case he should live to attain 21, such part of his real estate, as his son should choose, but not exceeding the yearly value of 350*l.*, and, to his daughter, such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.* Held that the son was entitled to priority of choice, on attaining 21, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* *Ibid.*
10. A testator after several devises and bequests, gave, devised and bequeathed all his messuages, chattels real, ready money, securities for money, debts, and personal estate to A. and B., their heirs, executors, administrators and assigns, upon certain trusts. Held that the legal estate in the premises mortgaged to the testator in fee, passed to A. and B., the trusts declared not being repugnant to that construction. *Mather v. Thomas* 115
11. Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted in the settlement so to be made, powers of leasing, sale, partition, and exchange. "And my will is that, in such intended settlement, shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature." Held that a power to appoint new trustees, was a proper and reasonable power to be inserted in the settlement. *Lindow v. Fleetwood* 152
12. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of 14, or to be reserved till they attained 21, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under 21. Held that James and Henry were entitled to the residue. *Prestwich v. Groombridge* 171
13. Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts, and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested. Held that

only the legacies in the will were payable out of the real estate. *Strong v. Ingram* 197

14. Testator after directing all his debts to be fully paid, devised his real estates to different persons, and charged certain of them with specific sums. Held that those estates, as well as the others, were charged with the debts. *Taylor v. Taylor* 246
15. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and, on her decease, I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment. Held that the children of T. F. were entitled to the fund, to the exclusion of their issue. *Jones v. Torin* 255
16. Testatrix gave a weekly sum to A. for his life or until he should attempt to assign, &c. the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should by will, duly executed, give and bequeath the same. A. died having made an invalid appointment of the stock. Held that there was an implied gift to his wife and children in default of appointment. *Brown v. Pocock* 257
17. Testator gave a sum of stock to his wife, for life, and after her death to his sons and daughter; and he directed the interest of his daughter's share to be paid to her for her separate use, for life, and, at her decease the capital to be divided amongst such children as she should have living at his decease; the shares of sons to be paid at 21, and of daughters at 21 or marriage, provided their mother was then dead, otherwise, her children's shares were not to be paid to them until her decease: but if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living: and if any of his said sons and daughter should die before his wife, and without leaving issue, their shares were to be divided among his other children. Held that the daughter's children living at the testator's death, took absolute vested interest at 21, though their mother was still living; and that her interest in the share of one of the testator's sons who died in the lifetime of his widow, was not subject to the same trusts as her original share, but vested in her absolutely. *Gibbons v. Langdon* 260
18. Testator devised his estates to trustees, in trust to pay out of the rents, 300*l.* a year for the maintenance of his son's children and to pay the surplus rents to his son du-

ring his life, for the maintenance of himself and his family, but so as he should not have any power to charge or alienate the same: provided that, if his son should in any manner impede or frustrate the trusts of the will, then the surplus rents should be paid no longer to him, but should be accumulated by the trustees for the benefit of the son's children. The son conveyed his interest under the will to trustees for his creditors. Held that, there upon the trust for accumulation took effect. *Lewes v. Lewes* 304

19. Testator devised an estate to trustees, in trust for R. T., for life, and after the death of R. T., in trust to convey the estate unto, between or amongst all and every and such one or more of the child or children of R. T., who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R. T. survived the testator, and died leaving several children and the issue of another child, who was dead at the date of the will. Held that such issue were entitled to take, amongst them, an equal share of the estate with the surviving children. *Tytherleigh v. Harbin* 329
20. Testator, by his will, gave an annuity, to his daughter, out of certain estates, for her separate use. By a codicil, he gave her a life estate, for her separate use, in the same estates. Held that the daughter was entitled to the life estate only. *Graves v. Hicks* 391
21. Testator charged his estates with an annuity in favour of his wife, and, subject thereto, he devised the estates in strict settlement. Afterwards, by his will and codicils, he charged the estates with several other annuities to his wife and other persons. Held that the first-mentioned annuity was the primary charge on the estates. *Ibid.*
22. Testator devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to his daughter, and, after her death, with the payment of an annuity to her husband. He then made a codicil which, in effect, revoked the husband's life estate in remainder. By a subsequent codicil, he gave, to the husband, a life estate in possession in the first estate, and also an annuity in possession, to the same amount and charged upon the same estates as the former annuity. Held that the second annuity was substituted for the first. *Ibid.*
23. Testator gave the interest of a fund to his wife for life, and after her death, to such of his four daughters as should be then living, in equal shares, during their

respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. Held that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. *Woodstock v. Shillito* 416

24. Testator bequeathed 5,000l. to A. if he attained 21, but if he should not attain that age or die without leaving issue male, then over. Held that the 5,000l. vested absolutely, in A. on his attaining 21. *Mytton v. Boodle* 457

25. Testator bequeathed the whole of his property to his wife, for her life, and directed that, upon her death, one-third should devolve on his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that should she not marry again and have other children, her affection for her daughter would induce her to make the daughter her principal heir. The widow died unmarried. Held that she took an absolute interest in the two-thirds under the will. *Hoy v. Master* 568

26. Testator gave his residuary estate to trustees in trust for his sisters' younger children equally, and to vest in them at

the usual periods; and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sisters, or to the guardians of the children, to be applied for their maintenance and education. Held that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. *Berkley v. Swinburne* 613

See CONSTRUCTION, 11, 12, 20, 22.—HEIR.
—REMOTENESS.—RESIDUARY BEQUEST.—
VENDOR AND PURCHASER, 2.

WITNESS.

1. Liberty given to the plaintiff to re-examine one of his witnesses to part of an interrogatory as to which the examiner had omitted to take down the deposition. *Bridge v. Bridge* 352
2. Leave given to plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached and still refusing to answer. *Lancaster v. Lancaster* 439

YEARLY RESTS.

See ACCOUNT, 2.

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